81-2317

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No.....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RANGER FUEL CORPORATION, *Petitioner*,

v.

THE YOUGHIOGHENY AND OHIO COAL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Where a valid contractual provision requires arbitration, can a party avoid federal enforcement of the right to arbitrate by joining its several claims in a state court lawsuit with the joint claims of a co-party, thus destroying diversity of citizenship?

2. Where plaintiffs in a state court lawsuit alleged both joint and several breaches of a contract, are both plaintiffs indispensable parties in a separate federal action against one of them to require arbitration under §4 of the Federal Arbitration Act?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	6
1. The Decision of The Fourth Circuit Enabling Y & O To Avoid The District Court's Order To Arbitrate By Joining Its Claims In The Ohio Action With The Claims Of A Third Party, Is Contrary To This Court's Controlling Decisions And Creates A Conflict Among The Circuits	6
2. This Court Should Exercise Its Supervisory Power To Review And Correct The Fourth Circuit's Alternative Holding That Bellemead Is An Indispensable Party To Ranger's Action In The Federal Court, Because It Is In Conflict With Applicable Decisions Of This Court	13
A. The Fourth Circuit Failed To Balance The Equitable Considerations In Fed. R. Civ. P. 19(b) Against The Strong Policies Of §4 Of The Federal Arbitration Act	13
B. Bellemead Is Not A Party Whose Joinder Is Needed For Just Adjudication Pursuant To Rule 19(a) In Ranger's Action Under §4	17
C. The Fourth Circuit's Decision That Bellemead Is An Indispensable Party Was Based On Theoretical Assumptions And Not On The Pragmatic Considerations Of This Litigation	20

Page

CONCLUSION 25

Appendix A (Opinion of the United States Court of Appeals for the Fourth Circuit) 1a

Appendix B (November 20, 1980 Order of the United States District Court for the Southern District of West Virginia) 9a

Appendix C (November 25, 1980 Order of the United States District Court for the Southern District of West Virginia) 11a

Appendix D (November 26, 1980 Order of the United States District Court for the Southern District of West Virginia) 13a

Appendix E (December 19, 1980 Order of the United States District Court for the Southern District of West Virginia) 15a

Appendix F (March 24, 1981 Order of the United States District Court for the Southern District of West Virginia) 17a

Appendix G (April 14, 1981 Order of the United States District Court for the Southern District of West Virginia) 18a

Appendix H (May 1, 1981 Order of the United States Court of Appeals for the Fourth Circuit) 20a

Appendix I (April 23, 1982 Order of the United States Court of Appeals for the Fourth Circuit) 22a

Appendix J (April 28, 1982 Order of the United States District Court for the Southern District of West Virginia) 23a

Appendix K (March 25, 1982 Judgment of the United States Court of Appeals for the Fourth Circuit) 24a

Appendix L (December 19, 1980 Order of the Court of Common Pleas of Harrison County, Ohio) 26a

Page

Appendix M (Complaint filed in the Court of Common Pleas of Harrison County, Ohio) 27a

Appendix N (Selected Pages of Indenture of Lease) 53a

Appendix O (Statutory Provisions) 55a

TABLE OF AUTHORITIES

CASES:

Air-Exec, Inc. v. *Two Jacks, Inc.*, 584 F.2d 942 (10th Cir. 1978) 19

Almacenes Fernandez, S.A. v. *Golodetz*, 148 F.2d 625 (2d Cir. 1945) 12

American Home Assurance Co. v. *Vecco Concrete Construction Co.*, 629 F.2d 961 (4th Cir. 1980) 15

Andrew Martin Marine Corp. v. *Stork Werkspoor Diesel B.V. and ABC Insurance Co.*, 480 F. Supp. 1270 (E.D. La. 1979) 9

Bernhardt v. *Polygraphic Co.*, 350 U.S. 198 (1956) 8

Bourdieu v. *Pacific Western Oil Co.*, 299 U.S. 65 (1936) 20

Burger Chef Systems, Inc. v. *Baldwin Inc.*, 365 F. Supp. 1229 (S.D. N.Y. 1973) 9

C. Itoh & Co. (America) v. *Jordan International Co.*, 552 F.2d 1228 (7th Cir. 1977) 7, 8, 11, 12, 16, 25

Commercial Metals Co. v. *Balfour, Guthrie, and Co.*, 577 F.2d 264 (5th Cir. 1978) 21

Fetzer v. *Cities Service Oil Co.*, 572 F.2d 1250 (8th Cir. 1978) 19

Grand Bahama Petroleum Co. v. *Asiatic Petroleum Corp.*, 550 F.2d 1320 (2d Cir. 1977) 8, 9, 24

Page

Hamilton Life Insurance Co. of New York v. *Republic National Life Insurance Co.*, 408 F.2d 606 (2d Cir. 1969) 7

Hanes Corp. v. *Millard*, 531 F.2d 585 (D.C. Cir. 1976) 7

Hilti, Inc. v. *Oldach*, 392 F.2d 368 (1st Cir. 1968) 7

In re Mercury Construction Corp., 656 F.2d 933, *reh. denied*, 664 F.2d 936 (4th Cir. 1981) *cert. granted sub nom. Moses H. Cone Memorial Hospital* v, *Mercury Construction Corp.*, ... U.S. ....., 71 L.Ed. 2d 647 (1982) 7, 9, 10, 12, 16, 22

Martin K. Eby Construction Co. v. *City of Arvada, Colorado*, 522 F. Supp. 449 (D. Colo. 1981) 8, 9

Prescription Plan Service Corp. v. *Franco*, 552 F.2d 493 (2d Cir. 1977) 20

Prima Paint Corp. v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) 8, 12, 15, 18, 21

Provident Tradesmens Bank & Trust Co. v. *Patterson*, 390 U.S. 102 (1968) 10, 14, 17, 19, 20, 22, 23

Ranger Fuel Corp. v. *The Youghiogheny and Ohio Coal Co.*, No. 81-1084 (4th Cir., Filed March 25, 1982) 1, 4, 5, 6, 10, 16, 17, 18, 20, 21, 22, 23, 24

Robert Lawrence Co. v. *Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960) 8, 21

Scherk v. *Alberto-Culver Co.*, 417 U.S. 506 (1974) 8

Shields v. *Barrow*, 58 U.S. 158 (1855) 10, 13

Soar v. *N.F.L. Players' Assoc.*, 65 F.R.D. 531 (D. R.I. 1975) 19

Tankersley v. *Albright*, 514 F.2d 956 (7th Cir. 1975) 15

Page

Teamsters Local 71 v. *Akers Motor Lines, Inc.*, 582 F.2d 1336 (4th Cir. 1978) 12, 16

Testa v. *Katt*, 330 U.S. 386 (1947) 22

UAW v. *Allis Chalmers Corp.*, 447 F. Supp. 773 (E.D. Wisc. 1978) 9

United Steel Workers v. *American Manufacturing Co.*, 363 U.S. 564 (1960) 12

Wichita R.R. & Light Co. v. *Public Utilities Comm'n*, 260 U.S. 48 (1922) 19

Wilson & Co. v. *Fremont Cake & Meal Co.*, 77 F. Supp. 364 (D. Neb. 1948) 12

STATUTES:

9 U.S.C. §4 ..... 1, 3, 4, 5, 9, 10, 11, 12, 13, 16, 19, 20, 23, 24, 25

28 U.S.C. §1332(a) 1, 3, 23

Fed. R. Civ. P. 19 ..... 1, 4, 5, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

Fed. R. Civ. P. 24 ..... 1, 19

MISCELLANEOUS:

68 American Bar Journal 274 (March 1982) ("Report by the Chief Justice") 8, 20

7 C. Wright & A. Miller, Federal Practice & Procedure §1610 (1972) 19

Fed. R. Civ. P. 19(b), Notes of the Advisory Committee on Rules, 1966 Amendment 15

H. R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1923) 13

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, published but currently unreported, is styled *Ranger Fuel Corp.* v. *The Youghiogheny and Ohio Coal Co.*, No. 81-1084 (4th Cir. filed March 25, 1982), and is attached hereto as Appendix A. The United States District Court for the Southern District of West Virginia did not render an opinion, but the District Court Order challenged in the Fourth Circuit is attached hereto as Appendix E.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on March 25, 1982. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES

The statutory provisions involved in the case are cited below and their full text is set forth in Appendix O.

9 U.S.C. §4
28 U.S.C. §1332(a)
Fed. R. Civ. P. 19(a) & (b)
Fed. R. Civ. P. 24

STATEMENT OF THE CASE

The Youghiogheny and Ohio Coal Company ("Y & O") owns approximately 24,000 acres of mineral rights in West Virginia, and shares ownership of an additional 7,000 acres with Bellemead Coal Company ("Bellemead"). By a lease executed on April 17, 1970, Ranger Fuel Corporation ("Ranger") acquired the right to mine all of the property, for which Y & O and Bellemead receive royalty payments. The lease provides at page 53 that "any controversy . . . arising under this Lease

shall be submitted to and determined by arbitration" and at page 54 that such arbitration "shall be a condition precedent to a resort to litigation by either party upon any matter in controversy arising under this Lease." App. N.

On August 4, 1980, without any prior notice of default to Ranger, Y & O and Bellemead sued Ranger and the Pittston Company ("Pittston")[1] in Harrison County, Ohio. In the complaint there are five counts that allege breach of contract claims on behalf of Y & O and Bellemead jointly, three counts alleging breach of contract claims solely on behalf of Y & O (Counts 1, 3 and 7), and a ninth count alleging violations of the West Virginia Antitrust Act. App. M. Counts 1, 3 and 7 relate to the lease of mineral rights on the 24,000 acres which are owned solely by Y & O.

Ranger filed a motion to dismiss the Ohio action, or in the alternative, to transfer the action to West Virginia, on grounds that Y & O and Bellemead were each bound by the express arbitration provision in the lease, that the Ohio court lacked *in personam* jurisdiction over Ranger because there were insufficient minimum contacts with the state, that service of process was inadequate, that venue was improper, that the parties to the lease selected West Virginia as the proper forum for any litigation, and that Bellemead, as an unlicensed Ohio plaintiff, could not proceed in Ohio under relevant Ohio law. Pittston moved to dismiss the Ohio action on grounds of lack of *in personam* jurisdiction, insufficient service of process, improper venue, and the failure of Bellemead to meet the Ohio licensing requirements. These motions are pending in the Ohio Common Pleas Court.

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[1]Ranger has been a wholly-owned subsidiary of Pittston since 1970. Pittston is not a party to the lease.

On November 14, 1980, after giving statutory notice to Y & O, Ranger filed a petition pursuant to Section 4 of the Federal Arbitration Act, 9 U.S.C. §§1-14, in the United States District Court for the Southern District of West Virginia, asserting that Y & O had expressly agreed in the lease to arbitrate all controversies arising under the lease prior to a resort to litigation. Jurisdiction in the district court was premised on diversity of citizenship under 28 U.S.C. §1332(a), since Y & O is an Ohio corporation and Ranger is a West Virginia corporation. On November 12, 1980, Ranger filed suit in the Circuit Court of Raleigh County, West Virginia to compel Bellemead to arbitrate as a condition precedent to any litigation; that action is pending.

By order dated December 19, 1980, the district court decreed that the lease "evidenc[ed] a transaction involving interstate commerce," that the "parties had agreed in writing to arbitrate all controversies arising under [the] Lease," that the claims in the first eight counts of Y & O's complaint "constitute controversies arising under [the] Lease," and that Bellemead was "not an indispensable party to" Ranger's action. The district court ordered Y & O to arbitrate those claims as a condition precedent to litigation, and enjoined Y & O from proceeding further in the Ohio action pending arbitration. Additionally, the district court stayed the enforcement of its order for two weeks, to permit Bellemead to intervene.[2] When Bellemead did not do so, the order became effective on January 2, 1981. App. E. Both the district court, after a hearing, and the United States Court of Appeals for the Fourth Circuit denied motions by Y & O to suspend or modify the injunction pending appeal. Apps. F & H.

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[2]The court's order required the clerk to mail a certified copy of the order by certified mail to counsel for Bellemead.

On appeal, the Fourth Circuit reversed the judgment of the district court, and remanded the case with directions to dismiss Ranger's action for lack of federal jurisdiction.[3] The judgment was entered on March 25, 1982.[4] App. K.

The Fourth Circuit first held that the district court would have had jurisdiction over Ranger's action under 9 U.S.C. §4 only if that court would have had jurisdiction to adjudicate the Ohio state court complaint. The Fourth Circuit characterized counts One through Eight of that action as a single "underlying controversy"—a misreading of the district court's finding that the claims in those counts were "controversies arising under" the lease (emphasis added). The Fourth Circuit then decided, without proper analysis, that Bellemead is a party "whose joinder is needed for just adjudication" pursuant to Fed. R. Civ. P. 19(a) in *the Ohio suit*, but apparently did not examine Bellemead's indispensability to that action under Rule 19(b). App. A. at 3a, slip. op. at 4. The court concluded that Bellemead's joinder was needed for just adjudication under Rule 19(a) because "Bellemead and Y & O are co-lessors to Ranger of jointly owned mineral interests," *id.*, even though the statement is true as to only 7,000 acres of the lease, and not as to 24,000 acres. Since the parties to the Ohio suit which arose out of the "controversy" (as defined by the Court of Appeals) included both Bellemead and Ranger, which are citizens of West Virginia, diversity did not exist in *that* suit, and therefore the district court lacked jurisdiction to enjoin Y & O under 9 U.S.C. §4. The Fourth Circuit did not even consider whether "parties" in §4 should mean the

[3]The Fourth Circuit did not reach the other findings of the district court.

[4]After the Fourth Circuit denied a timely motion to stay its judgment, the mandate issued on April 25, 1982.

parties to the §4 action itself, as the district court had clearly decided it did. App. E, Finding No. 1.

Alternatively, the Fourth Circuit ruled that under the provisions of Fed. R. Civ. P. 19(b), Bellemead was an indispensable party to Ranger's action to enforce the arbitration agreement against Y & O, and thus dismissal was required on that ground as well. The court apparently applied its earlier brief discussion of Bellemead's Rule 19(a) status in the Ohio suit to the §4 action without discussion. The Fourth Circuit did not analyze Bellemead's status in the §4 action using the criteria stated in Rule 19(a), but proceeded to find Bellemead indispensable under Rule 19(b).

The court found prejudice to Bellemead because the district court restricted Bellemead's "otherwise unfettered right to try [the Ohio] case with Y & O's assistance and support." App. A at 5a, slip op. at 6. That argument ignored the district court's findings that Y & O had bound itself not to litigate these disputes without proceeding to arbitration, and presumably, therefore, itself had no "unfettered right to litigate." The Fourth Circuit also found prejudice to Y & O and Bellemead because of the possibility that the Ohio court and an arbitrator might interpret the lease differently, *id.*, necessarily assuming that the West Virginia and Ohio state courts would improperly apply the substantive rules of the Federal Arbitration Act to permit Bellemead to litigate. The court then rejected the intervention offered by the district court to Bellemead as a means for avoiding any such prejudice. *Id.* 5a-6a, slip op. at 6-7. The court did not consider alternative measures by which the supposed prejudice could be lessened, such as affirming the order as to the claims that involve Y & O solely.

Next, the Fourth Circuit concluded that the district court's order was inadequate because it only bound Y & O. *Id.* at 6a-7a, slip op. at 8. Finally, the Fourth Circuit found it "most compelling" that Ranger could presumably join both Y & O and Bellemead in a state court action, *id.* at 7a, slip op. at 8-9, thus assuming the answer to the question of whether Ranger must give up its right to a federal forum under §4 simply because a non-diverse party, Bellemead, also breached the arbitration agreement.

REASONS FOR GRANTING THE WRIT

1. The Decision Of The Fourth Circuit, Enabling Y & O To Avoid The District Court's Order To Arbitrate By Joining Its Claims In The Ohio Action With The Claims Of A Third Party, Is Contrary To This Court's Controlling Decisions And Creates A Conflict Among The Circuits.

Y & O brought an action against Ranger in Ohio on claims peculiar to it, and also sued upon claims held jointly with Bellemead. Both Y & O and Bellemead had signed a contract which provided for arbitration. Ranger sought to enforce the arbitration provision in a federal diversity action against Y & O, and the district court ordered Y & O to arbitrate.[1] The reversal by the Fourth Circuit creates a broad basis for avoiding and delaying arbitration in situations where there are multiple parties to an arbitration contract.

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[1] By its December 19, 1980 order, the district court found that the transaction contemplated in the lease containing the arbitration clause involves interstate commerce, that the parties did make the arbitration agreement, and that arbitration was a condition precedent to litigation. App. E, Finding Nos. 2 & 3. Those findings were not reached on appeal.

The Fourth Circuit's decision sanctions Y & O's avoidance of federal jurisdiction on the grounds that the district court would not have had jurisdiction of the entire Ohio action and that Bellemead is an indispensable party. Such a result seriously compromises the usefulness of arbitration provisions. Moreover, the result is contrary to the strong public and judicial policies that favor the arbitration of disputes, and is in direct conflict with the law in other circuits as well as in the Fourth Circuit. A party may not preclude a federal order to arbitrate by the device of joining its claims with additional non-arbitrable claims (its own or others') or by joining additional non-diverse patries, or by commencing litigation in a state court. *Compare In re Mercury Construction Corp.*, 656 F.2d 933, *reh. den.*, 664 F.2d 936 (4th Cir. 1981), *cert. granted sub nom. Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, ____U.S. ____, 71 L. Ed. 647 (1982) (non-diverse third party) and *C. Itoh & Co. (America)* v. *Jordan International Co.*, 552 F.2d 1228 (7th Cir. 1977) *with Ranger Fuel Corp.* v. *The Youghiogheny and Ohio Coal Co.*, *No.* 81-1084 (4th Cir. Mar. 25, 1982). *Accord, Hamilton L. Ins. Co. of New York* v. *Republic National L. Ins. Co.*, 408 F.2d 606, 609 (2d Cir. 1969) ("... there is no impediment to enforcing an agreement to arbitrate as between two parties in a dispute involving a multi-party agreement."); *Hilti, Inc.* v. *Oldach*, 392 F.2d 368, 369 n. 2 (1st Cir. 1968). The Court of Appeals has erred here by "play[ing] a broad role in denying effect to [an] agreement to arbitrate" for hypertechnical reasons. *Hanes Corp.* v. *Millard*, 531 F.2d 585, 598 (D.C. Cir. 1976).

This Court has firmly stated that the parties' choice of arbitration as their forum for the resolution of disputes

must be honored.[6] "The United States Arbitration Act . . ., reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid 'the costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts . . . .'" *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974). Where the underlying transaction involves interstate commerce, as it does here, the parties have substantive federal rights in the validity and enforceability of their arbitration agreements by virtue of the federal Act. *See Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.* 388 U.S. 395, 403-05 (1967); *cf. Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203 (1956). Thus Ranger has the right under the Federal Arbitration Act to enlist the aid of a federal court to redress Y & O's failure to arbitrate. *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.* 271 F.2d 402 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960); *see Grand Bahama Petroleum Co.* v. *Asiatic Petroleum Corp.*, 550 F.2d 1230, 1326 (2d Cir. 1977).

In *C. Itoh & Co. (America)* and *Mercury Construtcion Corp., supra*, lawsuits were brought in breach of the arbitration agreements and in both cases additional parties who were not signatories to the arbitration agreements were joined as defendants in the lawsuit. In both cases the courts held that they had jurisdiction to enforce the agreements.[7] *Accord, e.g., Martin K. Eby Construction*

[6]Chief Justice Burger warned the American Bar Association on January 24, 1982, in his annual report on the state of the judiciary, that arbitration is a necessary tool for relieving the congestion in the federal courts and, in the process, for delivering better justice to the parties. The Chief Justice asked the ABA to begin immediately an in-depth project to propose alternative means of dispute resolution. "Isn't There a Better Way," 68 *American Bar Association Journal* 274 (March, 1982) ("Report by the Chief Justice"). It is most anomalous for the Judiciary to here frustrate the parties' undeniably valid agreement to arbitrate.

[7]Arbitration was not ordered in *C. Itoh & Co. (American)*, however, because the court found that the parties' exchange of forms had not resulted in a written agreement to arbitrate (under applicable UCC principles). 562 F.2d at 1237.

Co. v. *City of Arvada, Colo.*, 522 F. Supp. 449 (D. Colo. 1981); *Andrew Martin Marine Corp.* v. *Stork-Werkspoor Diesel B.V.*, 480 F.Supp. 1270 1271 (E.D. La. 1979). In *Mercury Construction*, the Fourth Circuit held that a building owner could not frustrate the contractor's right to compel arbitration under §4 in a federal court by filing a prior state court suit against the contractor *and* the architect, although the latter was a non-party to the arbitration agreement and not of diverse citizenship with respect to the contractor. The Fourth Circuit emphatically stated that even if the owner's claims against the contractor were incapable of severance from the owner's claims against the architect, "the federal authorities are clear that this is not a ground for denial of arbitration of a dispute embraced within the arbitration clause of the contract." 656 F.2d at 942. Considering the architect's non-diversity, the court said that the "addition of the architect" in the state action "certainly could not frustrate" the contractor's plain indisputable right to an arbitration of *its* dispute with the owner." *Id.*[8] (emphasis in original).

Thus, even though the contractor had raised a defense of arbitration in the state action, the Fourth Circuit noted the importance of the Federal Arbitration Act as federal substantive law and held that the district court should not have stayed determination of the §4 petition pending the state court's decision. 656 F.2d at 945. *Accord, Burger Chef Systems, Inc.* v. *Baldwin, Inc.*, 365 F.Supp. 1229 (S.D.N.Y. 1973). *See also Grand Bahama Petroleum Co.* v. *Asiatic Petroleum Corp.*, 550 F.2d at 1326; *UAW* v. *Allis Chalmers Corp.*, 447 F.Supp. 773 (E.D. Wisc. 1978). Yet a different panel of the Fourth Circuit has effectively done the opposite here, failing to give the right to sue

[8]The Fourth Circuit affirmed the district court's denial of the contractor's motion to remove the owner's suit to federal court for lack of diversity.

under §4 the importance it is due as a federal right.[9] Furthermore, because the third party here (Bellemead), unlike the third party in *Mercury Construction*, clearly had also agreed to arbitrate, ordinary logic would suggest that this is a stronger case for arbitration than *Mercury Construction*. Nevertheless, the Court of Appeals vacated the district court's enforcement of the arbitration clause for lack of jurisdiction.

Jurisdiction under §4 is established if, save for the arbitration agreement, the federal court "would have jurisdiction under Title 28 . . . of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. §4. The Fourth Circuit characterized the district court's Finding No. 4 as having "identified the controversy at hand" as counts one through eight of the Ohio complaint,[10] and held that

> Inasmuch as Bellemead and Ranger are both West Virginia corporations, the district court would not have had jurisdiction of the subject matter of the controversy concerning the lease because of a lack of diversity. *See* Shields v. Barrow, 58 U. S. (17 How.) 129 (1855). Consequently, the limitation expressed in 9 U.S.C. §4 prohibits the district court from compelling arbitration.[11]

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[9] Y & O filed its Ohio lawsuit without giving any notice whatsoever to Ranger that it intended to do so. Ranger never had an opportunity to assert its rights under §4 before Y & O attempted to circumvent the arbitration agreement.

[10] App. A at 4a, slip op. at 4.

[11] App. A at 4a, slip op. 4-5. *Shields* v. *Barrow* is the only "authority" cited by the Fourth Circuit to support its conclusion that the district court lacked jurisdiction under §4. The significance of that hundred year old case to the Fourth Circuit's holding—which apparently is not based on indispensability—is unclear, since *Shields* is concerned with "necessary" and "indispensable" parties. The case is doubtful precedent even on that score. Furthermore, in Provident Tradesmens Bank Trust Co. v. Patterson, 390 U.S. 102 (1968) the Supreme Court described *Shields* as an "unfortunate[ ] [attempt] to state general definitions of those persons without whom litigation could or could not proceed" and "not a substitute for the analysis required by . . . Rule [19(b)]." 390 U.S. at 123-25.

First, the Fourth Circuit plainly misread the district court's order. In fact, the district court found that:

> 4. The claims in Counts One through Eight of the complaint filed in [the Ohio action] . . . constitute controversies arising under said Lease (App. E, Finding No. 4.)

The district court concluded that there were "controversies", not "the controversy" into which the Fourth Circuit translated the order. The *only* parties to Counts 1, 3, and 7 of the Ohio complaint are Y & O and Ranger. Thus, even accepting the Fourth Circuit's view that the lawsuit actually filed (the Ohio suit) defines the "controversy" under §4, there are at least *three* separate controversies between Y & O and Ranger only (Counts 1, 3 and 7 of the Ohio complaint) as to which the district court would without question have diversity jurisdiction. Had it not been for the misreading of the finding below, the Fourth Circuit would have had to affirm the order at least as to those three claims. Indeed, unless *Itoh* was incorrectly decided, the district court was *required* to take jurisdiction of the §4 action with respect to Counts 1, 3 and 7, and the possible lack of jurisdiction over the petition regarding other controversies could not affect that duty. *C. Itoh & Co. (America)*, 552 F.2d at 1231-32.

Second, the Fourth Circuit construed the key word "parties" in §4 to mean the parties to the underlying controversy (including the lawsuit actually filed in Ohio) rather than the parties to the §4 action itself. Thus, the Court of Appeals necessarily included Bellemead as a "party" when it made its determination of whether the district court would have had jurisdiction. To define "parties" as those to the underlying controversy would require a court to inquire into or determine matters concerning the merits of that underlying dispute, which the

court may not do under the federal Act. *Teamsters Local 71* v. *Akers Motor Lines, Inc.*, 582 F.2d 1336, 1342 (4th Cir. 1978); *Wilson & Co.* v. *Fremont Cake & Meal Co.*, 77 F.Supp. 364, 379 (D. Neb. 1948). *See also United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960). The question is not: "Is the suit that was filed in the state court one over which the federal court would have diversity jurisdiction?", but rather "Are the parties who are before the court in this §4 action of diverse citizenship?"

The district court unquestionably would have diversity jurisdiction under §4 of "a suit" arising between Ranger and Y & O, based on the alleged breach of the lease. *In re Mercury Construction Corp.*, 656 F.2d at 942. To require the court to determine whether it would have had jurisdiction of the entire lawsuit actually filed by Y & O is an invitation to evasion of federal enforcement of an arbitration agreement by careful draftsmanship. To permit such legerdemain is in conflict with the purpose of the statute and the principles of the cases cited above: that a party's right to federal enforcement of an arbitration agreement must not be frustrated by the procedural maneuvering of the party resisting arbitration. *See, e.g., C. Itoh & Co. (America); Almacenes Fernandez S.A.* v. *Golodetz*, 148 F.2d 625 (2d Cir. 1945). The approach adopted by the Fourth Circuit defeats the purpose of both §4 and the parties' arbitration clause. "[T]he unmistakably clear congressional purpose [was] that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. at 404. Under the Fourth Circuit's decision, the arbitration process becomes contingent on a race to different courthouses

and the ability of the plaintiff to dream up colorable diversity-destroying co-domiciliaries.

Arbitration can only be an effective alternative to litigation if parties can rely on the fact that they will not need to spend time and money in the courts. H. R. Rep. No. 96, 68th Cong. 1st Sess. at 2 (1923) ("The procedure [provided in the bill] is very simple, following the lines of ordinary motion procedure, reducing technicality, delay and expense to a minimum and at the same time safeguarding the rights of the parties."). The Fourth Circuit's decision in this case undercuts that reliance by a needlessly technical construction of §4, and thereby will discourage the use of arbitration.

2. This Court Should Exercise Its Supervisory Power To Review And Correct The Fourth Circuit's Alternative Holding That Bellemead Is An Indispensable Party To Ranger's Action In The Federal Court Because It Is In Conflict With Applicable Decisions Of This Court.

The Court of Appeals rejected the district court's jurisdiction of Ranger's §4 action in two brief paragraphs, citing only the outdated and irrelevant "authority" of *Shields* v. *Barrow*, 58 U.S. 158 (1855). The Fourth Circuit then launched into a lengthy analysis of its alternative holding, that Bellemead was an indispensable party under Fed. R. Civ. P. 19(b). Since joining Bellemead would destroy diversity jurisdiction, the court held that Ranger's action had to be dismissed.

Under Rule 19, the Court of Appeals was required to examine the action pragmatically, to decide whether Bellemead was significantly interested in the action between Ranger and Y & O (Rule 19(a)), and if so, to determine whether "in equity and good conscience the

action should proceed . . . or should be dismissed" (Rule 19(b)). Because Rule 19 is an equitable, nonjurisdictional rule, its application must be balanced against the goals embodied in the federal statute as to which enforcement is sought. Before reaching the question of indispensability, the court must determine whether a party is "needed for just adjudication" by inquiring: (1) will his absence prevent the court from according complete relief to the parties present? and (2) is his absence from the action (a) practically likely to impair his protection of an interest which he claims related to the subject of the action or (b) subject the parties present to a substantial risk of inconsistent liability because of his interest? If the court finds that the absent party should be joined by the tests of Rule 19(a), but that joinder cannot be made, then it must assess pragmatically the desirability of proceeding with the action, applying *inter alia*, the factors specified in Rule 19(b). Only if the court finds that it would be inequitable for the action to proceed should it order dismissal, finding the absent party to be indispensable. *See Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. at 118-19. As Ranger shows in this argument, the Fourth Circuit did not apply Rule 19 correctly.

A. The Fourth Circuit Failed To Balance The Equitable Considerations Stated In Fed. R. Civ. P. 19(b) Against The Strong Policies Of §4 Of The Federal Arbitration Act.

The Court of Appeal's opinion fails to consider the broader implications of its holding with respect to other actions under §4. Nowhere in the opinion does the court take into account the purposes of §4 in deciding "whether in equity and good conscience the action should proceed

among the parties before it, or should be dismissed. . . ." Fed. R. Civ. P. 19(b). Even after satisfying the clear standards of §4, a plaintiff in the Fourth Circuit may find its action dismissed on wholly non-jurisdictional, joinder grounds, which depend solely on the parties' common-law relationships.

Rule 19(b) is an equitable rule to be applied to actions in the federal courts. The purpose of Rule 19(b) is to protect all the parties, whether before the court or not, against the prejudices that might arise from having a final judgment entered in the absence of a party involved in the controversy. *See e.g., Tankersley* v. *Albright*, 514 F.2d 956, 965 & 966 n.21 (7th Cir. 1975). Rule 19(b) is *not* jurisdictional. "Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process." Notes of the Advisory Committee on Rules, 1966 Amendment, General Considerations. The factors stated in the rule "do not themselves negate the court's power to adjudicate as between the parties who have been joined." *Id.*

The Fourth Circuit failed to realize that the policies of the Federal Arbitration Act are also "equitable" and must be taken into account when applying Rule 19(b). The purpose of §4 of the Act is to provide a party with a speedy means to require a recalcitrant party to arbitrate. To accomplish that goal, the legislative sponsors specified that the court would inquire only into these basic issues: whether an arbitration agreement was made and whether the controversy is arbitrable. *See Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. at 403-04; *American Home Assurance Co.* v. *Vecco Concrete Construction Co.*, 629 F.2d 961 (4th Cir. 1980).

Ranger's action under §4 of the Arbitration Act is not a lawsuit in which the district court will make any final determination of the parties' rights in the controversy. Indeed, the court is without power to judge the merits of the dispute. *In re Mercury Construction Corp.*, 656 F.2d at 939 n. 9; *Teamsters Local 71* v. *Akers Motor Lines, Inc.*, 582 F.2d at 1342. Only if the district court was in error in concluding that Y & O has an obligation to arbitrate are the rights of Y & O in the controversy adversely affected —and even that determination would be subject to review on appeal.[11] Because adjudication of the merits of the controversy is left entirely to the arbitrator, the purposes of Rule 19(b) are at most only tangentially implicated in granting a petition under §4, and there is consequently a greatly diminished interest in the strict application of the rule. *See C. Itoh & Co. (America)*, 552 F.2d at 1230-32. A §4 action does affect the important federal right to enforce an arbitration agreement, but it does not and cannot affect other substantive rights of the parties.

The factors which the Fourth Circuit cited in finding Bellemead to be indispensable all arose out of the simple truth that Bellemead and Y & O are parties to a contract with Ranger, and that contract has an arbitration clause. The more parties there are to an agreement, the greater is the likelihood that mandatory joinder would destroy diversity jurisdiction under §4. A party seeking to compel arbitration may thus find itself having to file numerous state court suits.[12] It is ironic that the Fourth Circuit's

[11] That crucial finding of the district court (*see* note 5 *supra*) was not reached on appeal.

[12] Where a lack of diversity necessitates the filing of lawsuits to compel arbitration in both federal and state courts, it is clear that the discretionary considerations of judicial economy (i.e., a preference for one forum) may not interfere with the federal court's jurisdiction to enforce the arbitration agreement under §4 of the federal Act. *See* C. Itoh & Co. (America), 552 F.2d at 1232.

rule puts such an obstacle in the way of federal jurisdiction precisely as a result of the original willingness of the multiple parties to this interstate commerce transaction to agree to use an arbitral forum for their disputes.

B. Bellemead Is Not A Party Whose Joinder Is Needed For Just Adjudication Pursuant To Rule 19(a) In Ranger's Action Under §4.

Rule 19(a) governs the determination of whether a party should be joined in an action in the district court. If the court finds that a party should be joined, but that its joinder would destroy the court's jurisdiction, the court must then determine, based on a practical analysis of the factors specified in Rule 19(b), whether the action should be dismissed and the party considered "indispensable." *E.g., Provident Tradesmens Bank & Trust Co.* v. *Patterson*. 390 U.S. at 118-19. The Fourth Circuit concluded that Bellemead satisfied the requirements of Rule 19(a), saying that:

> Bellemead's status is central to the jurisdictional issues which this appeal raises. Bellemead and Y & O are co-lessors to Ranger of jointly owned mineral leases. All three companies are parties to the same lease.[14]

The fact that Y & O is the sole owner of 24,000 acres and Y & O and Bellemead jointly own only 7,000 acres was ignored, either in error, or to deemphasize the importance of the several claims and inflate the relative importance of the joint claims.[15] Thus Bellemead's interest is in no sense coextensive with or identical to Y & O's interest under the lease, and this is reflected by the fact that Bellemead is

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[14] App. A at 3a, slip op. at 4.

[15] The Fourth Circuit correctly stated Y & O and Bellemead's relative interests in its opinion, App. A at 2a, slip op. at 2, but ignored that recitation and its implications in the quoted paragraph.

not even a party to three of the nine counts in the Ohio suit.[16] Furthermore, that Bellemead is a party to the lease and thus to the arbitration agreement is irrelevant to whether Y & O agreed with Ranger to arbitrate disputes such as those contained in its Ohio complaint—and that, and no more, is the extent to which the district court should inquire into either the contract or the underlying disputes. *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. at 403-04.

When Bellemead's position is correctly analyzed vis-a-vis Ranger's §4 action, Rule 19(a) clearly does not require Bellemead's joinder. First, complete relief can be accorded between Ranger and Y & O on the only issue, that of Y & O's obligation to arbitrate. Rule 19(a)(1). Second, there is absolutely no showing in the record that Bellemead "claims an interest" in whether Y & O has to arbitrate. Rule 19(a)(2). Although in its analysis under Rule 19(b) the Fourth Circuit asserted, without basis, that Bellemead has a right to try its Ohio case with Y & O's assistance, such an "interest" is not one which that court was free to recognize, given the finding of the district court that Y & O had agreed to arbitrate those disputes.[17] Moreover, if Bellemead's unspecified interest is in maintaining that it has no obligation to arbitrate, it remains free to litigate that position in the West Virginia state court without *res judicata* or collateral estoppel effect from the district court's decision. Further, as a practical matter, it is apparent from reading both the lease and the Ohio complaint that Bellemead has no colorable

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[16] *See* app. A. at 7a, slip op. at 9. This error of treating the §4 action as though it were the action filed by Y & O *and* Bellemead in the Ohio court infects the entire Fourth Circuit opinion. See pp. 4, 10-12 *supra*.

[17] *See* p. 5 *supra*.

claim permitting it to avoid arbitration. Apps. M & N. Rule 19(a)(2)(i)."[8]

If one looks solely to the jointly leased acreage, and assumes that Bellemead has an interest related to Ranger's §4 action, and if one assumes that Bellemead's ability to protect that interest might be harmed by its absence from the lawsuit, Bellemead was free to cure all these problems by intervening. A party whose joinder is desirable under Rule 19(a), but who is not indispensable, may intervene pursuant to Rule 24(a) without destroying the court's jurisdiction." *Fetzer* v. *Cities Service Oil Co.*, 572 F.2d 1250 (8th Cir. 1978) (action by lessees for accounting under oil and gas leases); *Wichita R.R. & Light Co.* v. *Public Utilities Comm'n*, 260 U.S. 48 (1922). Indeed, "indispensable" is a label attached to a party only after the court analyzes the four factors of Rule 19(b) and concludes that "in equity and good conscience" the action should be dismissed. *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. at 118-19. Since intervention is permissible for a Rule 19(a) party, that procedure must be examined as a means of avoiding prejudice under Rule 19(b) and used wherever possible to avoid reaching the

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[8] "If Y & O were ordered to arbitrate but Bellemead were permitted to sue, then Ranger might arguably be subject to inconsistent liability. Rule 19(a)(2)(ii). However, the Fourth Circuit was required to assume that the state court would apply federal substantive arbitration law correctly and order Bellemead to arbitrate. The possibility of inconsistency is thus too remote to be considered. *See Air-Exec, Inc.* v. *Two Jacks, Inc.*, 584 F.2d 942, 945 (10th Cir. 1978); *Soar* v. *N.F.L. Player's Assoc.*, 65 F.R.D. 531, 538 (D.R.I. 1975).

[9] "In rejecting intervention as a measure for avoiding prejudice under Rule 19(b), the Fourth Circuit cited a discussion by Wright & Miller of Rule 24 intervention which seems to state flatly that intervention is not possible where the jurisdictional problem arises from a lack of diversity. Wright & Miller believe, however, that intervention *should* be permissible in those circumstances, *see* p. 23 *infra*, and they are clear that intervention to solve a Rule 19(a) joinder problem is appropriate. 7 C. Wright & A. Miller, Federal Practice & Procedure §1610 at 98-100 (1972).

conclusion that the party is indispensable.[20] *See, e.g., Prescription Plan Services Corp.* v. *Franco*, 552 F.2d 493, 497 n.4 (2d Cir. 1977). In this case, the district court correctly held that intervention would eliminate any possible claims of prejudice, since Bellemead would have had the opportunity to present its entire position on the issue of arbitrability directly to the court.

C. The Fourth Circuit's Decision That Bellemead Is An Indispensable Party Was Based On Theoretical Assumptions And Not On The Pragmatic Considerations Of This Litigation.

Rule 19(b) specifies four factors which guide a court's determination of whether a party which cannot be joined is indispensable. Rather than making a pragmatic judgment between the alternatives of proceeding and dismissal, *see Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. at 117 n.12, the Fourth Circuit relied on wholly speculative possibilities based upon two fundamental, erroneous assumptions it made. First, the Fourth Circuit assumed that Bellemead has an unspecified "right" to litigate whatever claims it has against Ranger in the Ohio court.[21] Second, the opinion silently assumed that the Ohio or the West Virginia state courts may be unable to apply correctly the substantive law of the Federal Arbitration Act and may reach results inconsistent with those of the district court.[22] In these assumptions, the Fourth Circuit's opinion shows a "resist[ance] [to] arbitration" and a concern for the "right" to litigate that underlies the court's narrow limitations on Ranger's rights under §4. *See* Report by the Chief Justice, 68 *ABAJ* at 277.

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[20]The philosophy of Rule 19(b) is to avoid dismissal wherever possible. *Bourdieu* v. *Pacific Western Oil Co.*, 299 U.S. 65 (1936).

[21]App. A at 5a, slip op. at 6.

[22]App. A at 5a-7a, slip op. at 6 & 8.

In examining the four factors stated in Rule 19(b), the Fourth Circuit first found that the district court's order was prejudicial to Bellemead because it "restrict[ed] . . . Bellemead's otherwise unfettered right to try this case *with Y & O's assistance and support.*"[23] Only if the district court erred in requiring Y & O to arbitrate does *Y & O* have any right to litigate. According to the district court, Y & O had no right at all to litigate. Thus Bellemead could hardly have "an unfettered right to try this case with Y & O's assistance and support." Moreover, Bellemead itself is at least *prima facie* bound to arbitrate its disputes with Ranger, if it has any, because Bellemead "fettered" itself with the identical contract provision to which Y & O agreed. *See* App. N.

The Fourth Circuit found further prejudice to both Bellemead *and Y & O* because "the Ohio court and an arbitrator" might interpret contractual clauses covering both lessors differently.[24] That conclusion assumes that even if Y & O were forced to arbitrate, the Ohio state court would permit Bellemead to litigate, *i.e.*, that either the Ohio or West Virginia state courts would fail to order Bellemead to arbitrate as a condition precedent to litigation, as clearly agreed in the contract. That assumption is impermissible because as a matter of Constitutional law, the Federal Arbitration Act must be applied by a state court in a suit where the underlying transaction involves interstate commerce, as is the case here.[25] *E.g.*, *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. at 405; *Commercial Metals Co.* v. *Balfour, Guthrie, and Co.*, 577 F.2d 264, 269 (5th Cir. 1978); *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F.2d at 407. Yet, though the district

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[23]App. A at 5a, slip op. at 6 (emphasis added).
[24]App. A at 5a, slip op. at 6.
[25]App. E, Finding No. 2.

court found that an arbitration agreement was made and that the lessors' claims were arbitrable controversies, [26] the Fourth Circuit apparently assumed that the West Virginia or Ohio courts would arrive at a different conclusion. As another panel of the Fourth Circuit recently stated with respect to an issue of arbitrability in a state court, the federal courts will not make such assumptions. *In re Mercury Construction Corp.*, 664 F.2d at 938. Thus, the Fourth Circuit's findings of prejudice are based on an incorrect view of the federal system and of the obligations of the judicial systems of the states to carry out federal policy. "For the policy of the federal Act is the prevailing policy in every state. . . . [T]his Court [has] stated that a state court cannot 'refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.' [Citation omitted.]" *Testa* v. *Katt*, 330 U.S. 386, 393 (1947) (and cases cited therein).

The court below, applying the second factor of Rule 19(b), concluded that prejudice could not be adequately lessened by permitting Bellemead to intervene, as the district court had provided. However, the conclusion that prejudice to Bellemead existed is fundamentally in error, as shown above. Consequently the need to develop measures to lessen any prejudice disappears.[27] Furthermore,

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[26] App. E, Finding Nos. 3 & 4.

[27] It was within the Fourth Circuit's power to affirm the order as to Counts 1, 3 and 7 of the Ohio complaint, which are asserted solely on behalf of Y & O. *See* p. 11 *supra*. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. at 112, 116.

Furthermore, the court below assumed that if Bellemead intervened, it "could reasonably anticipate that it would be governed by the prior rulings. . . ." (Slip op. at 6). Although that was a startling conclusion to draw from an absence of indication in the record, it was also within the Fourth Circuit's power to require the district court to reopen its consideration of the merits in the event that Bellemead intervened. *See* Provident Tradesmens Bank & Trust Co., 390 U.S. at 111.

the Fourth Circuit should not have rejected intervention out-of-hand as a means of avoiding prejudice to Bellemead. Although the federal courts generally have held that an indispensable party may not intervene if his doing so would destroy diversity jurisdiction, the Supreme Court in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. at 114, left open the issue of whether intervention by a non-diverse absent party is permissible if prejudice will be lessened and the court can thereby avoid a finding that the party is indispensable. Wright & Miller argue persuasively that intervention should be permitted in those circumstances. *See* note 19 *supra*. It is significant that Bellemead never even attempted to intervene in Ranger's §4 action to protect its alleged interest.

The court below, applying the third factor stated in Rule 19(b), determined that "a judgment rendered in [Bellemead's] absence will be inadequate," because the judgment could not give Ranger relief against *both* Y & O and Bellemead for their breaches of the arbitration agreement. Simply put, the court stated nothing more than that a judgment in the absence of a party cannot bind that party, and as such it is clear that the court based its determination of "adequacy" on factors unrelated to the practical considerations of this litigation. Two of the three lease parties are West Virginia citizens, the leased acreage is within West Virginia, and the lease specified that the United States District Court for the Southern District of West Virginia would select the third arbitrator if the parties' arbitrators failed to agree. Yet Y & O filed suit, in breach of its arbitration agreement, in an Ohio state court.

Ranger believed that in such circumstances, the neutral federal forum guaranteed to it by 28 U.S.C. §1332(a)

would best serve its goal of preserving its federal rights, *see Grand Bahama Petroleum Co.* v. *Asiatic Petroleum Corp.*, 550 F.2d at 1325; and also believed that Y & O was the active party in the Ohio lawsuit. In its §4 action Ranger sought to vindicate its right to require Y & O to arbitrate. The district court did not need to enter an order against Bellemead to effectuate *that* relief, and thus the district court's order was in fact adequate.[28]

The fourth and "most compelling" factor to the Fourth Circuit was "whether [Ranger] will have an adequate remedy if the action is dismissed for nonjoinder." The court found that Ranger could amend its pleadings in the West Virginia state court to add Y & O as a defendant. By this overly simplified analysis of Ranger's rights, the court assumed the very question it should answer, *i.e.*, whether a plaintiff must give up its rights to a federal forum under §4 against a diverse party simply because a non-diverse party also breaches the arbitration agreement. The court completely ignored the fact that the Federal Arbitration Act creates a federal substantive right. *E.g.*, *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. at 405 Given diversity jurisdiction over the parties before the court, it is indeed puzzling that the federal court refuses to enforce that right. As its justification for dismissal, the opinion relies on the "proliferat[ion] [of] litigation." However, it is beyond question that such "[c]onsiderations of judicial economy bear no relation to 'the making and performance of an agreement to

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[28]Again, the court apparently assumed that the state court would not correctly apply the federal Act to require Bellemead to arbitrate App. A at 6a, slip op. at 8.

There is another reason why the judgment is "adequate." If "adequacy" is taken to incorporate concepts of the public interest in the complete and efficient settlement of controversies, then the district court's judgment would have advanced that interest by requiring Y & O to abide by its agreement to settle its entire controversy in an arbitral forum.

arbitrate', and to permit a district court to deny a stay pending arbitration based on such discretionary considerations would . . . frustrate the strong federal policy in favor of arbitration which is expressed in the Federal Arbitration Act as interpreted by the Supreme Court." *C. Itoh & Co. (America)*, 552 F.2d at 1232.

The Fourth Circuit's opinion thus automatically relegates a federal plaintiff's entire action under §4 to a state court simply because the plaintiff made an arbitration agreement with a party residing in the same state, not withstanding that jurisdiction is proper in federal court as to all the other parties. That result is at odds with the important right to a federal forum which is provided by the Judiciary Code, and only emphasizes once more that the Fourth Circuit's opinion will encourage litigation to avoid arbitration.

CONCLUSION

For the reasons stated above, Ranger Fuel respectfully requests this Court to issue a writ of certiorari to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 81-1084

RANGER FUEL CORPORATION,

Appellee,

v.

THE YOUGHIOGHENY AND OHIO COAL COMPANY,

Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Dennis R. Knapp, Chief Judge.

Argued November 2, 1981 Decided March 25, 1982

Before WINTER, Chief Judge, HAYNSWORTH, Senior Circuit Judge, and BUTZNER, Circuit Judge.

John F. Kay, Jr. (Susan C. Armstrong, David G. Shuford, Mays, Valentine, Davenport & Moore; Stephen A. Weber, Kay, Casto & Chaney; John C. Kinder, Edward K. Cheffy, Kinder, Kinder & Hanlon on brief) for appellant; W. Warren Upton (Charles Q. Gage, Paige Auer Winck, Jackson, Kelly, Holt & O'Farrell on brief) for appellee.

BUTZNER, Circuit Judge:

The Youghiogheny and Ohio Coal Company (Y&O) appeals from an order of the district court requiring it to

arbitrate certain disputes with the Ranger Fuel Corporation. We reverse the order of the district court and remand with instructions to dismiss the action.

I

Y&O and the Bellemead Coal Company jointly own the mineral rights to 7,000 acres of land in West Virginia.[1] Y&O is the sole owner of the rights to an additional 24,000 acres. The two companies leased the combined 31,000 acres to Ranger for 20 years, with agreements that Ranger would mine the area and pay royalties on the coal produced.

The lease contained a provision for the arbitration of disagreements. Disagreements did arise—whether covered by the arbitration clause we do not decide—and Y&O and Bellemead eventually sued Ranger in an Ohio state court.[2] About two weeks later, Ranger brought this action against only Y&O in the United States District Court for the Southern District of West Virginia, asking the court to stay the Ohio suit and compel Y&O to arbitrate its claims. Ranger relied on the Federal Arbitration Act,[3] specifically 9 U.S.C. §4,[4] as the basis for its petition.

Recognizing that the Arbitration Act does not provide an independent jurisdictional basis, Ranger relied on

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[1]The fraction owned by each differs from place to place and from coal seam to coal seam, but those differences are not relevant for our purposes.

[2]Ranger's parent corporation, the Pittston Company, was also a defendant in the Ohio action. For simplicity, we refer only to Ranger throughout the opinion.

[3]61 Stat. 670, ch. 392 (July 30, 1947) codified at 9 U.S.C. §§1-14.

[4]Section 4 states in part: A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

diversity of citizenship under 28 U.S.C. §1332(a). Y&O is an Ohio corporation; Ranger is a West Virginia corporation; and Bellemead, the omitted party, is also a West Virginia corporation.[3]

At a hearing in the district court, Y&O raised a number of jurisdictional, procedural, and substantive defenses to Ranger's action. Rejecting all of Y&O's contentions, the court held that it had jurisdiction and that Bellemead was not an indispensable party. It ordered Y&O to arbitrate with Ranger all but one of the claims pending before the Ohio court and to refrain from further proceedings in Ohio until the arbitration was complete.[4] The judge also stayed his order for a short time to afford Bellemead an opportunity to intervene. Bellemead, however, did not exercise this option.

II

Bellemead's status is central to the jurisdictional issues which this appeal raises. Bellemead and Y&O are co-lessors to Ranger of jointly owned mineral interests. All three companies are parties to the same lease. But for the destruction of diversity jurisdiction, Bellemead satisfies in every respect the requirements of Rule of Civil Procedure 19(a) for feasible joinder. *See* Harrell v. Sumner Contracting Co., 546 F.2d 1227, 1228-29 (5th Cir. 1977).

The Arbitration Act states that the district court can enforce an agreement to arbitrate if, save for the agreement, the court "would have jurisdiction under Title 28 . . . of the subject matter of a suit arising out of the con-

[3]Ranger brought suit in a West Virginia state court against Bellemead to compel arbitration of the Ohio claims.

[4]An antitrust claim was found by the court not to be arbitrable. Y&O was, nevertheless, enjoined from proceeding in Ohio until the other claims were arbitrated.

troversy between the parties . . ." 9 U.S.C. §4. The district court identified the controversy at hand as counts one through eight of the Ohio action brought by both Y&O and Bellemead against Ranger, and this finding is not clearly erroneous. These counts include allegations that Ranger has breached its obligations to both Bellemead and Y&O. Inasmuch as Bellemead and Ranger are both West Virginia corporations, the district court would not have had jurisdiction under Title 28 of the subject matter of the controversy concerning the lease because of a lack of diversity. *See* Shields v. Barrow, 58 U.S. (17 How.) 129 (1855). Consequently, the limitation expressed in 9 U.S.C. §4 prohibits the district court from compelling arbitration.

Ranger insists, however, that the dispute over arbitration is the critical controversy and that this question must be adjudicated independently of the allegations of the Ohio suit. We are not persuaded that the distinction Ranger suggests justifies a different analysis of this appeal. Nevertheless, we will briefly examine Ranger's approach to the question of jurisdiction.

This aspect of the jurisdictional question is governed by rule 19(b). Because Bellemead cannot be joined without destroying diversity jurisdiction, the district court was required to determine, as provided by the text of the rule, "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." The four factors prescribed by the rule for making this judgment must be considered in the light of the pragmatic effect of the alternatives of proceeding or dismissing. *See* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 116-17 n. 12 (1968).

The rule's first factor is "to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties." Although Bellemead is not bound by the express terms of the district court's order prohibiting Y&O from litigating in Ohio, the practical effect of the injunction places restrictions on Bellemead's otherwise unfettered right to try this case with Y&O's assistance and support. Moreover, in view of the complex nature of the underlying controversy, it is conceivable that the Ohio court and an arbitrator might differ in their interpretations of the same contractual clauses that govern the rights of Y&O and Bellemead. Therefore, we conclude that the district court's order prejudicially affects both Y&O and Bellemead by multiplying procedures that might lead to inconsistent results.

The second factor specified by the rule is "the extent to which, by protective provision in the judgment, by the shaping of relief, or other measures, the prejudices can be lessened or avoided." Ranger asserts that the district judge dissipated whatever prejudice Bellemead suffered by permitting it to intervene. The difficulty in Ranger's argument is two-fold. The district judge did not offer Bellemead the option to intervene until *after* he had ruled in favor of Ranger. Thus, as an intervenor, Bellemead would be hard pressed to protect itself. There is no indication in the record that the court intended to reopen consideration of the merits of the case if Bellemead intervened. From all that appears, Bellemead could reasonably anticipate that it would be governed by the prior rulings of the court should it voluntarily intervene. The second reason for questioning Ranger's argument is the destruction of jurisdiction caused by the intervention of

a non-diverse, indispensable party.' Of course, if a court properly decides that the intervenor is not indispensable, intervention will not destroy jurisdiction.[8] But this decision must be made independently of the court's offer to allow intervention. In short, if Bellemead was indispensable when the action was filed, its character did not change simply because the court offered it the option to intervene.

The third factor is "whether a judgment rendered in the person's absence will be adequate." In this case, the judgment is inadequate. Ranger complained that both Y&O and Bellemead breached the parties' agreement to arbitrate by filing suit in Ohio. But the judgment does not prevent Bellemead from attempting to pursue the Ohio action. True, future motions for relief may characterize Bellemead as bound because its position as a colessor demonstrates that it is acting in concert with Y&O. The possibility of future litigation on this issue simply

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[7]The interplay between intervention and jurisdiction in this situation is explained in 7A Wright & Miller, Federal Practice and Procedure, §1917 at 601-02:

> To this general principle [ancillary jurisdiction] there is one long-established exception. A person who should have been joined in the first instance because he is so related to the action that he is regarded as "indispensable" cannot intervene if his joinder will deprive the court of jurisdiction over the subject matter of the action. The action must be dismissed, as Rule 19(b) requires, if the court concludes that he is so related to the action that he is indispensible. For this reason the courts, in considering an application for intervention by one whose joinder would defeat diversity or otherwise destroy jurisdiction, will examine his relation to the action and allow him in only if he otherwise meets the tests of Rule 24(a) (2) and they are are able to conclude that he was not an indispensible party to the original action. This presents something of an anomaly. The whole theory of ancillary jurisdiction is that it allows the court to go beyond the case immediately before it and to deal with other persons and matters that are closely related to it. Yet if the absentee is so closely related to the main action that "in equity and good conscience" the action should not proceed without him, the ancillary concept cannot be invoked. The reason for the anomaly is that "a contrary view would provide an easy means to evade diversity jurisdictional requirements." (brackets added, footnotes omitted)

[8]See 7A Wright & Miller, Federal Practice and Procedure §1917 at 603-04.

emphasizes the inadequacy of the judgment as it is now written. Also, Ranger, who claims to be entitled to the arbitration of its differences with both Y&O and Bellemead, can only arbitrate with Y&O under the terms of the judgment. If it is to arbitrate with Bellemead, it must secure an order either in Ohio or West Virginia. This proliferation of litigation also demonstrates the inadequacy of the judgment. *See* Doty v. St. Mary Parish Land Co., 598 F.2d 885, 888 (5th Cir. 1979).

The fourth factor is, in this case, the most compelling. It is "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." By simply supplementing its pleadings Ranger can seek to compel arbitration against both co-lessors, Y&O and Bellemead, in the actions that are pending in both Ohio and West Virginia. Ranger has pled the arbitration clause of the lease as a defense in Ohio, and it has brought an action against Bellemead in West Virginia, where Y&O appears to be subject to process. Both states provide for the enforcement of agreements to arbitrate, and Ranger has cited no deficiencies that make the state laws less effective for Ranger's purposes than the federal Act. Consequently, there is no need to proliferate litigation over the question of arbitration by this action in federal court.

In sum, without Bellemead the district court could not compel arbitration pursuant to 9 U.S.C. §4, for it would not have had jurisdiction to adjudicate the underlying controversy that is the subject of the suit brought by Y&O and Bellemead against Ranger in Ohio. We also conclude that whether Bellemead's status be tested by the underlying controversy that is the subject of the Ohio suit or by the petition for arbitration and stay of the Ohio litigation that is the subject of the federal action, Belle-

mead is an indispensable party. The federal action, therefore, should be dismissed because the joinder of Bellemead would destroy diversity.

The judgment of the district court is reversed, and the case is remanded with directions to dismiss Ranger's action, without prejudice, however, to its attempt to compel arbitration in another forum.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

RANGER FUEL CORPORATION,
a West Virginia corporation,
Petitioner,

v. CIVIL ACTION NO. 80-5172

THE YOUGHIOGHENY AND OHIO COAL COMPANY, an Ohio corporation,
Respondent.

ORDER

On the 14th day of November, 1980, Ranger Fuel Corporation appeared through counsel for a hearing on the Petition of Ranger Fuel Corporation heretofore filed, and The Youghiogheny and Ohio Coal Company appeared specially through its counsel in response to said Petition.

Thereupon The Youghiogheny and Ohio Coal Company presented for filing herein its Motion in response to said Petition, and said Motion is hereby ORDERED filed.

Thereupon the Court heard the parties with respect to said Petition and Motion, as is more fully stated on the record and incorporated herein by reference.

Counsel for The Youghiogheny and Ohio Coal Company having agreed on the record not to further prosecute or proceed in the case of *The Youghiogheny and Ohio Coal Company et al.* v. *Ranger Fuel Corporation et al.*, Civil Action No. 80-155-15874, Court of Common Pleas, Harrison County, Ohio, for a period of two weeks, that

is until December 1, 1980, it is accordingly ORDERED that

1. On or before November 19, 1980, The Youghiogheny and Ohio Coal Company shall file its memorandum in support of its jurisdiction objections set forth in the aforesaid Motion;

2. On or before November 25, 1980, Ranger Fuel Corporation shall file its memorandum in response thereto; and

3. The parties shall appear for further hearing on this matter at 11:00 a.m., Wednesday, November 26, 1980.

Counsel for the parties having agreed, counsel for Ranger Fuel Corporation shall transmit a certified copy of the within order to the Court of Common Pleas of Harrison County, Ohio.

ENTER: Nov. 20, 1980

DENNIS R. KNAPP, CHIEF JUDGE
United States District Court

PRESENTED BY:

PAIGE AUER WINCK
JACKSON, KELLY, HOLT & O'FARRELL
Post Office Box 553
Charleston, West Virginia 25322
Counsel for Ranger Fuel Corporation

Inspected by:

STEPHEN A. WEBER
Counsel for The Youghiogheny and Ohio Coal Company

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

RANGER FUEL CORPORATION,
a West Virginia corporation,
Petitioner,

v. CIVIL ACTION NO. 80-5172

THE YOUGHIOGHENY AND OHIO COAL COMPANY, an Ohio corporation,
Respondent.

ORDER

On the 24th day of November, 1980, the Court on its own motion contacted by telephone the within parties through counsel for a continuance of the hearing heretofore scheduled for November 26, 1980, the Court informing counsel that it would be unable to hear the parties as scheduled because of a continuing jury trial.

Accordingly, it is ORDERED that:

(1) Respondent shall take no further action in the case of *The Youghiogheny and Ohio Coal Co. et al.* v. *Ranger Fuel Corporation et al.*, Civil Action No. 80-155-15874, Court of Common Pleas, Harrison County, Ohio, until such time as the Court may hear the parties; and

(2) The hearing on this matter is hereby continued to 1:30 p.m., Friday, December 5, 1980.

This order shall have no effect or limitation upon any proceedings, conferences or hearings scheduled by the Court of Common Pleas of Harrison County, Ohio.

ENTER: Nov. 25, 1980

DENNIS R. KNAPP, Chief Judge

PREPARED BY:

PAIGE AUER WINCK
JACKSON, KELLY, HOLT & O'FARRELL
1500 One Valley Square
Post Office Box 553
Charleston, West Virginia 25322

Counsel for Petitioner
Ranger Fuel Corporation

INSPECTED BY:

STEPHEN A. WEBER
KAY, CASTO & CHANEY
Charleston National Plaza
Charleston, West Virginia 25301

Counsel for Respondent
The Youghiogheny & Ohio Coal Company

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

RANGER FUEL CORPORATION,
a West Virginia corporation,
Petitioner,

v. CIVIL ACTION NO. 80-5172

THE YOUGHIOGHENY AND OHIO COAL COMPANY, an Ohio corporation,
Respondent.

ORDER

On the 26th day of November, 1980, came the parties, each by its respective counsel, for a hearing upon the motion of Respondent to modify the Court's order of November 25 1980, by deleting therefrom paragraph 1 of said order on grounds that this court had no jurisdiction or authority to stay or enjoin any action by Respondent in the Court of Common Pleas of Harrison County, Ohio.

WHEREUPON, the Court heard argument by each of said counsel in support of their respective positions, upon which argument, and mature consideration thereof, the Court is of the opinion to, and does hereby DENY Respondent's said motion to which action by the Court Respondent, by counsel, objects and accepts.

Dated this 26th day of November, 1980.

ENTER:

DENNIS R. KNAPP, CHIEF JUDGE

SUBMITTED BY:

PAIGE AUER WINCK
JACKSON, KELLY, HOLT & O'FARRELL
1500 One Valley Square
P. O. Box 1588
Charleston, West Virginia 25322
Counsel for Ranger Fuel Corporation, Petitioner

INSPECTED BY:

STEPHEN A. WEBER
KAY, CASTO & CHANEY
P. O. Box 2031
Charleston,West Virginia 25327
Counsel for The Youghiogheny and Ohio Coal Company, Respondent

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

RANGER FUEL CORPORATION, a West Virginia corporation,

Plaintiff,

v. Civil Action No. 80-5172,

THE YOUGHIOGHENY AND OHIO COAL COMPANY, an Ohio Corporation,

Defendant.

ORDER

On the 5th day of December, 1980, the parties appeared through counsel for a conference on the petition filed herein pursuant to Title 9, United States Code, Section 4, and respondent's motion and answer filed in response thereto.

After mature consideration of the prior hearing in this matter, the argument of counsel, and the pleadings and memoranda filed herein, the Court finds that:

1. The Court has jurisdiction over this action pursuant to Title 28, United States Code, Section 1332(a), the Court finding specifically that Bellemead Coal Company is not an indispensable party to the within case;

2. The Lease in question constitutes a contract evidencing a transaction involving interstate commerce;

3. The parties agreed in writing to arbitrate all controversies arising under said Lease, and agreed further that said arbitration is a condition precedent to a resort to litigation;

4. The claims in Counts One through Eight of the com-

plaint filed in the case of *The Youghiogheny and Ohio Coal Company, et al.* v. *Ranger Fuel Corporation, et al.*, Civil Action No. 80-155-15874, Court of Common Pleas, Harrison County, Ohio, constitute controversies arising under said Lease.

Accordingly, pursuant to Title 9, United States Code, Section 4, if respondent desires to pursue any or all of its claims alleged in Counts One through Eight of the aforesaid Ohio civil action, it is hereby ORDERED that respondent shall as a condition precedent to a resort to litigation proceed to arbitration on said claims, as provided in the Lease.

To protect and effectuate the Court's judgment herein, it is further ORDERED that respondent shall refrain from, and is hereby enjoined from, further proceedings in the aforesaid Ohio civil action pending arbitration of said alleged claims,

It is further ORDERED that the effectiveness and enforcement of the within order shall be stayed until 5:00 p.m., January 2, 1981, during which time leave is hereby given to Bellemead Coal Company to file a motion to intervene pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, if it desires to do so.

The Clerk is directed to mail a certified copy of this order by certified mail, return receipt requested, to Robert Bailey, counsel for Bellemead Coal Company, Blackshear-Rundle Building, Box 129, Pineville, West Virginia 24874 and a certified copy to The Honorable Edward D. Mosser, Court of Common Pleas, Harrison County Ohio, Cadiz, Ohio 43907. The Clerk is further directed to mail certified copies to counsel for the parties hereto.

ENTERED: December 19, 1980
DENNIS R. KNAPP, CHIEF JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY DIVISION

RANGER FUEL CORPORATION,
a West Virginia corporation,
Plaintiff,

v.

Civil Action No. 80-5172

THE YOUGHIOGHENY AND OHIO
COAL COMPANY, an Ohio Corporation,
Defendant.

ORDER

Now before the Court is the defendant The Youghiogheny and Ohio Coal Company's Motion to Suspend or Modify Injunction Pending Appeal, duly filed on February 19, 1981.

The Court has carefully considered the aforesaid motion, together with the various memoranda in support of and in opposition to said motion, and is of the opinion to deny said motion.

Accordingly, it is hereby ORDERED that the Motion to Suspend or Modify Injunction Pending Appeal be, and the same is, denied.

The Clerk is directed to mail certified copies of this order to counsel of record herein.

ENTERED: March 24, 1981
DENNIS R. KNAPP, CHIEF JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

RANGER FUEL CORPORATION,
a West Virginia corporation,
Petitioner,

v. CIVIL ACTION NO. 80-5172

THE YOUGHIOGHENY AND OHIO COAL COMPANY, an Ohio corporation,
Respondent.

ORDER

On April 10, 1981, came the parties by counsel whereupon counsel for the respondent The Youghiogheny and Ohio Coal Company advised the Court his client did not desire to pursue the matters reflected in the two affidavits filed by Stephen A. Weber pursuant to Rule 10(c) of the Federal Rules of Appellate Procedure.

Whereupon counsel for petitioner Ranger Fuel Corporation advised the Court that in light of the representations of counsel for the respondent, petitioner Ranger Fuel Corporation did not desire the Court to rule upon its objections heretofore filed in response to the affidavits of the respondent.

There being no objection thereto and the Court perceiving none, in light of the representations of counsel that they do not desire a ruling of the Court in respect to the affidavits filed pursuant to Rule 10(c) of the Federal Rules of Appellate Procedure, and the objections filed in

response thereto, it is accordingly ORDERED that the affidavits and the objections thereto shall remain a part of the record herein, but because of the agreement of counsel there will be no ruling by the Court thereon.

Dated this 14th day of April, 1981.

ENTER:
DENNIS R. KNAPP
Judge

Presented by:

W. WARREN UPTON
PAIGE A. WINCK
JACKSON, KELLY, HOLT & O'FARRELL
1500 One Valley Square
P. O. Box 553
Charleston, West Virginia 25322

Counsel for Petitioner, Ranger Fuel Corporation

Approved by:

STEPHEN A. WEBER

Counsel for Respondent

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-1084

Ranger Fuel Corporation,

Appellee,

v.

The Youghiogheny and Ohio Coal Company,

Appellant.

Filed May 1, 1981

U. S. Court of Appeals
Fourth Circuit

ORDER

Upon consideration of the motion filed by the Youghiogheny and Ohio Coal Company (Y & O) to either modify or stay, pending appeal, an order of the district court that enjoined Y & O from proceeding against Ranger Fuel Corporation and The Pittston Company in an action filed in a state court until Y & O proceeds to arbitration on certain of its claims in accordance with the provisions of a lease between it and Ranger Fuel: the response of Ranger Fuel; the record compiled for the purpose of this motion, and the memoranda of the parties;

It appearing to the court that Y & O has not satisfied the requirements of Long v. Robinson, 432 F.2d 977 (4th

Cir. 1970) (chamber's opinion of Winter, J.), and Airport Commission of Forsyth County, North Carolina v. Civil Aeronautics Board, 296 F.2d 95 (4th Cir. 1961), for a stay of the order of the district court pending appeal;

WHEREUPON, with the concurrence of Judge Russell, it is ADJUDGED and ORDERED that the motion for a stay or modification of the injunction pending appeal is denied.

JOHN D. BUTZNER, JR.
United States Circuit Judge

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-1084

Ranger Fuel Corporation,

Appellee,

v.

The Youghiogheny and Ohio Coal Company,

Appellant.

Filed April 23 1982
U. S. Court of Appeals
Fourth Circuit

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston, Dennis R. Knapp, Chief Judge.

Upon consideration of a motion of the appellee, for stay of mandate pending application to the Supreme Court of the United States for a writ of certiorari,

IT IS ORDERED that the motion is DENIED.

For the Court—by Direction.
WILLIAM K. SLATE II
Clerk

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY DIVISION

RANGER FUEL CORPORATION,
a West Virginia corporation,

Plaintiff,

v. Civil Action No. 80-5172,

THE YOUGHIOGHENY AND OHIO
COAL COMPANY, an Ohio
corporation,

Defendant.

Entered April 28, 1982

.....Order Book

No.....Page.....

ORDER

In conformity with the order of the United States Court of Appeals for the Fourth Circuit dated March 25, 1982, and entered in this court on April 22, 1982, it is hereby ORDERED that this action be dismissed without prejudice and stricken from the docket of this court.

The Clerk is directed to mail certified copies of this order to counsel of record herein.

DATED: April 28, 1982
DENNIS R. KNAPP, CHIEF JUDGE

APPENDIX K

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1084

Ranger Fuel Corporation,

Appellee,

v.

The Youghiogheny and Ohio Coal Company,

Appellant.

Filed March 25, 1982
U. S. Court of Appeals
Fourth Circuit

Appeal from the United States District Court for the Southern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed and remanded to the United States District Court for the Southern District of West Virginia at Charleston for further proceedings consistent with the opinion of this court filed herewith.

/s/ WILLIAM K. SLATE II
Clerk

COSTS—APPELLEE

Cost of printing appellant's brief	256.00
Cost of printing appellant's appendix	63.20
Cost of printing appellant's reply	108.00
Docketing fee	65.00
	$492.20

APPENDIX L

IN THE COURT OF COMMON PLEAS OF HARRISON COUNTY, OHIO

The Youghiogheny and Ohio
Coal Company, and
Bellemead Coal Company

vs.

Ranger Fuel Corporation
and The Pittston Company

Case No. 80-155-15874
Judgment Entry

On Motion of the Court it is hereby ordered that a copy of the order entered on December 19, 1980, in Civil Action No. 80-5172 pending in the United States District Court, Southern District of West Virginia, Charleston Division, wherein Ranger Fuel Corporation is party Plaintiff and the Youghiogheny and Ohio Coal Company is party Defendant, be filed herein.

EDWARD D. MOSSER, Judge

Stamped Copies To:

Attorney John C. Kinder
Attorney W. Warren Upton
Attorney Robert Bailey
Attorney Edward Cheffy
Attorney Charles Bean
Attorney Stanley Burech
Clerk, U. S. Dist. Court, Southern Dist., W. Va.
Charleston Division, for filing in Civil
Action No. 80-5172

APPENDIX M

IN THE COURT OF COMMON PLEAS
HARRISON COUNTY, OHIO

The Youghiogheny and Ohio Coal Company
Post Office Box 157
Cadiz, Ohio 43907
and
Bellemead Coal Company
Ravencliffs, West Virginia 25913
Plaintiffs,

vs.

Ranger Fuel Corporation
Lebanon, Virginia 24266
and
The Pittston Company
1 Pickwick Plaza
Greenwich, Connecticut 06830
Defendants.

Filed August 4, 1980
Donald N. Jones
Clerk of Courts Harrison County, Ohio

COMPLAINT
Case No. 80-155-15874

JURY DEMAND ENDORSED HEREON

1. Plaintiff, The Youghiogheny and Ohio Coal Company (sometimes hereinafter referred to as "Y & O"), is a corporation organized and existing under the laws of the State of Ohio, and residing in Harrison County, Ohio.

2. Plaintiff, Bellemead Coal Company (sometimes hereinafter referred to as "Bellemead"), is a corporation

organized and existing under the laws of the State of West Virginia with an office in Ravencliffs, West Virginia.

3. Defendant, Ranger Fuel Corporation (sometimes hereinafter referred to as "Ranger"), is a corporation organized and existing under the laws of the State of West Virginia with an office in Lebanon, West Virginia.

4. Defendant, The Pittston Company (sometimes hereinafter referred to as "Pittston"), is a corporation organized and existing under the laws of the State of Deleware and the State of Virginia, with an office in Greenwich, Connecticut.

5. Plaintiff, Y & O, is the owner of coal in and underlying approximately twenty-four thousand two hundred thirty-five and 89/100 (24,235.89) acres of land (sometimes hereinafter referred to as "Area 100") situated in Raleigh and Wyoming Counties, West Virginia, and Plaintiffs, Y & O and Bellemead, are the owners of undivided interests in coal in and underlying approximately seven thousand two hundred twenty one and 35/100 (7,221.35)) acres of land (sometimes hereinafter referred to as "Area D") situated in Wyoming County, West Virginia, (said coal lands sometimes hereinafter referred to as the "premises").

6. Y & O, Bellemead and Ranger signed a document dated November 1, 1968, styled "Indenture" whereby Defendant. Ranger, was empowered to conduct geological explorations for coal in the said coal lands owned by Y & O and Bellemead and to lease the said coal lands from Y & O and Bellemead in accordance with the terms of an Indenture of Lease, which was incorporated in and made a part of said Indenture.

7. The Defendant, Ranger, by its executive officers, came to Cleveland, Ohio, for purposes of discussing and negotiating the terms of the documents described in the preceding paragraphs before said documents were signed; Y & O signed the aforesaid Indenture in Cleveland, Ohio, and acknowledged the same before a Notary Public in and for Cuyahoga County, Ohio; Y & O signed a document submitted by Ranger in accordance with the aforesaid Indenture and Indenture of Lease styled "Notice of Election of Right to a Six Months' Extension of Option" in Cleveland, Ohio, on or about October 3, 1969; Y & O signed a document styled "Correction of Lease" related to the aforesaid Indenture of Lease dated April 20, 1970, in Cleveland, Ohio, and acknowledged the same before a Notary Public in and for Cuyahoga County, Ohio, on May 4, 1970; Y & O signed a document styled "Indenture", which extended a deadline in the aforesaid Indenture of Lease, dated September 22, 1970, in Cleveland, Ohio and acknowledged the same before a Notary Public in and for Cuyahoga County, Ohio, on or about September 30, 1970; Defendant, Ranger, and Defendant, Pittston, do and at all times herein did direct correspondence to Y & O at its offices in Cleveland, Ohio, Martins Ferry, Ohio, Cadiz, Ohio, and/or St. Clairsville, Ohio; and at all times herein, Defendant, Ranger and Defendant, Pittston, placed telephone calls and engaged in telephone conferences concerning the premises and related matters with Y & O's officers and employees in Cleveland, Ohio, Martins Ferry, Ohio, Cadiz, Ohio and/or St. Clairsville, Ohio. Defendant, Pittston, directed promises and inducements by mail to Plaintiff, Y & O, in Cleveland, Ohio, which were relied upon by Y & O in Cleveland, and which, had they been fulfilled, would have resulted in substantial payment in Ohio. Defendants made and di-

rected all payments to Y & O at Cleveland, Martins Ferry, Cadiz, or St. Clairsville, Ohio. The wrongful acts herein alleged affected Plaintiff, Y & O, in Ohio.

8. The Defendant, Ranger, did enter in and on said premises and did cause geological explorations to be made and did accumulate geological information as provided in said Indenture.

9. On or about September 30, 1969, Defendant, Ranger, signed a Notice of Election of Rights to a Six Months' Extension of Option, which Notice was signed by Y & O on October 3, 1969, as aforesaid.

10. On or about April 8, 1970, Ranger advised Y & O that it intended to execute the Indenture of Lease as provided in the Indenture, and on or about April 17, 1970, Ranger delivered a document styled "Notice of Election to Exercise Option" to Y & O and Bellemead.

11. Thereafter, on or about April 17, 1970, said Indenture of Lease was executed by James M. Osborne, President of Y & O, and by Charles B. Gates, Jr., President of Bellemead, and by Leo Vecellio, President of Ranger.

12. The term of said Indenture of Lease is twenty (20) years.

13. After said Indenture of Lease was executed, a Correction of Lease dated April 20, 1970, was executed to correct an omission in the description of said premises.

14. In September, 1970, Defendant, Ranger, informed Plaintiffs it could not have mining facilities under construction by November 1, 1970, as required by the Indenture of Lease, and requested an extension of time to have facilities under construction or commence mining. Defendant, Ranger, promised as inducement to the execution by Plaintiffs of a proposed one year extension, to

construct a mine producing coal from the Sewell seam in the McGraw area by early 1972 and to have a mine or mines producing in the Trough Fork area by late 1972 which would produce one million two hundred fifty thousand (1,250,000) tons of clean coal per year. In September, 1970, in reliance on said inducement, Plaintiffs executed a document styled "Indenture" dated as of September 22, 1970, granting the Lessee a one year extension in which to have mining facilities under construction or to commence mining, which said Indenture provided that Lessee would proceed with all haste in mine planning and finalize plans as soon as possible.

15. On or about November 27, 1970, Defendant, Pittston, acquired all of the outstanding shares of stock of Defendant, Ranger.

16. The Defendants never commenced the mine in the McGraw Area.

17. The Defendants produced no coal from the Trough Fork area until December, 1973. The mines at the Trough Fork area have never produced one million two hundred fifty thousand (1,250,000) tons per year, but the maximum annual production from the Trough Fork area on which a royalty has been paid has been two hundred forty-one thousand eight hundred seventy-one (241,871) tons of coal in 1979. The Defendants now project a total of only six hundred thousand (600,000) tons of coal per year from the Trough Fork area until the end of the lease term.

18. The Plaintiff, Bellemead, received no production royalties whatsoever from the Defendants until October, 1977, at which time more than one-third (1/3) of the lease term had passed.

19. The seven seams in which the Defendants have mined contained approximately two hundred and six million (206,000,000) tons of raw coal in place to a thirty (30) inch mining thickness in the Beckley, Little Raleigh and Sewell seams and about thirty million (30,000,000) tons in about eighteen hundred (1,800) acres which have been explored in the Douglas, War Eagle, Lower Eagle, and Upper Eagle seams. To a twenty-eight (28) inch mining thickness, the Beckley, Little Raleigh and Sewell seams contain approximately thirteen million, three hundred thousand, (13,300,000) additional tons of coal. Additional reserves exist in other seams and areas for which no geological information has been furnished to Plaintiffs.

20. Defendants have mined no coal from other seams known to exist in the premises.

21. The Defendants have paid a royalty upon a total of only one million seven hundred twenty-three thousand eight hundred eighty-one (1,723,881) tons of coal from the premises, which is less than one and one-half percent (1.5%) of the reserves identified in Paragraph 19. This percentage would be even lower if reserves in all seams and areas were considered.

22. The Beckley No. 1 Mine, located in the Trough Fork area, was designed to have access to approximately eight thousand (8,000) acres of Beckley seam coal containing approximately sixty million (60,000,000) tons of coal in place to a (30) thirty inch mining thickness. The Defendants have paid royalty on only two hundred eighteen thousand nine hundred seventy-seven (218,977) tons from this mine, the equivalent of less than one percent (1%) of said coal in place, and the Defendants abandoned said mine in 1978.

23. The Beckley No. 2 Mine, located near Sabine, was designed to have access to approximately twelve thousand three hundred thirty-four (12,334) acres of Beckley seam coal containing approximately ninety million (90,000,000) tons of coal in place. Defendants have paid a royalty on only three hundred fifty-two thousand nine hundred thirty-seven (352,937) tons of coal from this site. The annual capacity of said mine is one million sixty-six thousand (1,066,000) tons of coal. Based on production to date and the annual capacity, which annual capacity has never been achieved, the Defendants will have paid royalties on a maximum of eleven million (11,000,000) tons of clean coal at the end of the twenty (20) year term. This maximum production by the end of the lease term is equivalent to less than twenty-five percent (25%) of the reserves identified in said mine.

24. The Beckley No. 4 Mine, located in the Trough Fork Area, was designed to have access to approximately four thousand five hundred twenty-five, (4,525) acres of Sewell seam coal containing approximately twenty-six million (26,000,000) tons of coal in place. As of May, 1980, the Defendants had paid a royalty upon only four hundred thirty-nine thousand one hundred sixty (439,160) tons of coal from this mine. The annual capacity of said mine is six hundred thousand (600,000) tons of clean coal. Based on production to date and the annual capacity of the mine, which annual capacity has never been achieved, the Defendants will have paid royalties on a maximum of six million, four hundred thirty-nine thousand, one hundred sixty (6,439,160) tons of coal at the end of the twenty (20) year term. The maximum production by the end of the lease term is equivalent to less than fifty percent (50%) of the mine's reserves.

25. In addition to the coal produced from the three

mines described in Paragraphs 22, 23, and 24, Defendants have produced, by themselves, their contractors or others, coal from approximately eight (8) small mines, all but one of which have been abandoned. Royalties have been paid on only six hundred ninety seven thousand six hundred seventy (697,670) tons from all of these mines.

26. Combining the production from the mines listed in Paragraph 25 with the production from the three mines described in Paragraphs 22, 23, and 24, the Defendants have paid royalties on a total of one million seven hundred twenty-three thousand eight hundred eighty one (1,723,881) tons of coal, or less than one and one half percent (1.5%) of the reserves identified in Paragraph 19, during the first half of the lease term.

27. The Defendants have projected to the Plaintiffs that they will mine from the entire premises five hundred thousand (500,000) tons of clean coal in 1980, one million three hundred thousand (1,300,000) tons in 1981 and one million five hundred thousand (1,500,000) tons per year through 1990, the end of the twenty (20) year term, and that all of this projected tonnage will come from existing mines. Based on the production to date and the Defendants' projections, which projections have never been achieved in the past, the Defendants will have produced a maximum of approximately seventeen million (17,000,000) tons of clean coal from the premises by 1990, which is less than fifteen percent (15%) of the total identified coal reserves in the seams which have been mined and a much smaller percentage of the total coal on the premises.

28. The Defendant, Ranger, did not sell any of the coal mined on the premises, but Defendant, Pittston, did sell that coal which has been sold.

29. The defendant, Pittston, has made all decisions which have resulted in development or nondevelopment of the premises.

30. Defendants, Ranger and Pittston, have breached and violated the terms of the Indenture and Lease, have by their neglect and fault damaged and wasted Plaintiff's coal, have wrongfully failed to mine and market Plaintiff's coal, have failed to market Plaintiff's coal in the best market reasonably available, have wrongfully failed to construct and operate mines promised to be constructed and operated, have wrongfully failed to produce specific tonnages from specific mines by the time promised, have conspired to limit production from the premises, and have otherwise by their breach, fault and neglect damaged and injured Plaintiffs all as hereinafter more fully alleged.

31. The documents referred to in this Complaint are too numerous to attach hereto.

FIRST COUNT

32. Plaintiffs incorporate the allegations contained above in Paragraphs 1 through 31 as if fully rewritten.

33. Defendants, in the construction and operation and abandonment of the Beckley No. 1 Mine, have breached those covenants and provisions of the Indenture of Lease wherein it was promised that the most effectual workmanlike and proper methods of mining would be used according to the most approved and applicable modern methods of mining in vogue, that the Lessee would not leave isolated areas of coal and that Lessee would conduct operations with due regard to the future value of the premises as coal producing property.

34. Defendants' breach of said covenants has caused

great and permanent injury to the Beckley No. 1 Mine, which contains about sixty million (60,000,000) tons of unmined Beckley seam coal, and to the Little Raleigh seam of coal which contains about eighteen million (18,000,000) tons of coal, which said coal in place in said Beckley and Little Raleigh seams would have had the fair and reasonable value of about seventy-eight million dollars ($78,000,000.00) but which now has no value at all because of the injury caused it by Defendants' said breaches.

35. Defendants' breach of said covenants and resultant injury to the Beckley No. 1 Mine have resulted in the abandonment of said mine by Defendants so that said mine is producing no coal at all, whereas except for said breaches said mine would have yielded royalty income to Plaintiff, Y & O, on sales of fifteen million (15,000,000) tons of coal which Plaintiff, Y & O, believes and avers would have yielded about twenty-one million dollars ($21,000,000.00) in royalties to this date and would have continued to yield royalty income until the end of the term of the Indenture of Lease in an amount unknown to Plaintiff, Y & O, but which said Plaintiff avers would aggregate such amount as would have a present value of about forty million dollars ($40,000,000.00).

36. Plaintiff, Y & O, avers that Defendants were negligent in the construction and operation of the Beckley No. 1 Mine and that their said negligence proximately caused such injury to the Beckley seam of coal and to the Little Raleigh seam above it and to the slope giving access to said seams as to render them valueless and that said coal in said seams would have had the fair and reasonable value of about seventy-eight million dollars ($78,000,000.-00) had it not been so injured.

37. Plaintiff, Y & O, avers that the activities of Defendants at and in connection with the Beckley No. 1 Mine were and are a waste of the Beckley seam of coal accessible from said mine which comprises about sixty million (60,000,000) tons of said coal and of the Little Raleigh seam of coal which comprises about eighteen million (18,000,000) tons of said coal.

WHEREFORE, Plaintiff, Y & O, prays for judgment in the amount of seventy-eight million dollars ($78,000,000.00) for damages done by the breaches and negligence of the Defendants proximately resulting in the total loss of the Beckley seam of coal at said Beckley No. 1 Mine and the Little Raleigh seam above it, or, in the alternative, Plaintiff, Y & O, prays for judgment in the amount of twenty-one million dollars ($21,000,000.00) with interest thereon for royalty payments it should have been paid to this date had the Beckley No. 1 Mine not been injured by the breaches and negligence as alleged in this Count and for damages in the amount of forty million dollars ($40,000,000.00) for royalties that should have been yielded during the remainder of the term, and Plaintiff, Y & O, prays that Defendants be required to render a full accounting to Plaintiff, Y & O, for all royalties which could reasonably have been paid to date and to the expiration of the term of the Indenture of Lease had the Defendants not done waste as alleged in this Count, and to make payment to Plaintiff, Y & O, in accordance with said accounting, in the amount of sixty-one million dollars ($61,000,000.00), the amount belived to be due Plaintiff, Y & O, for said royalties, together with interest and costs.

SECOND COUNT

38. Plaintiffs incorporate the allegations contained above in Paragraphs 1 through 37 as if fully rewritten.

39. The Indenture of Lease requires the Defendants to conduct their operations in such manner as to secure and recover during the twenty (20) year term of the lease the greatest practical quantity of coal with the least practical loss of coal.

40. The Defendants have mined coal in only seven (7) of the many seams which have been identified on the premises.

41. As more particularly described in Paragraphs 17 through 26 of this Complaint, Defendants, in the mining activities conducted by them on the premises from the date of the inception of the Indenture of Lease to May 31, 1980, at which time ten (10) years of the twenty (20) year term of the Indenture of Lease had passed, had paid a royalty on a total of only one million seven hundred twenty-three thousand eight hundred eighty-one (1,723,-881) tons, which is equivalent to less than one and one-half percent (1.5%) of the identified reserves.

42. As more particularly alleged in Paragraph 27 of this Complaint, Defendants have projected that by the expiration of the term of the Indenture of Lease in April 1990, they will have mined less than fifteen percent (15%) of the reserves identified on the premises, which reserves are incompletely identified and aggregate considerably greater tonnage than those herein specifically described.

43. Defendants have never constructed a mine at the McGraw site, although they promised to have such a mine in operation in early 1972, as is hereinafter more fully alleged.

44. Plaintiffs aver that the greatest practical quantity of coal with the least practical loss which could have been

produced from the premises by the expiration of the term would have been one hundred eighteen million (118,000,000) tons of clean coal and that the total tons of clean coal which will be produced by the end of the term, according to production to date and future projections, which projections have never been met, are less than seventeen million (17,000,000) tons.

45. Defendants have breached their covenant to secure and recover from the premises during the twenty (20) year term the greatest practical quantity of coal with the least practical loss of coal and have repudiated the said covenant by their acts and projections.

46. Defendants have asserted to the Plaintiff, Y & O, and third parties that the term of the Indenture of Lease is sixty (60) years and not twenty (20) years, thereby repudiating said covenant of the Indenture of Lease.

WHEREFORE, Plaintiff, Y & O, prays for judgment against Defendants in the amount of one hundred twenty million dollars ($120,000,000.00) and Plaintiff, Bellemead, prays for judgment against Defendants in the amount of nineteen million dollars ($19,000,000.00), which are the sums due and owing each of them on account of Defendants' breaches and repudiation as alleged in this Count, and Plaintiffs pray for interest and costs and for a rescission of the Indenture of Lease.

THIRD COUNT

47. Plaintiffs incorporate the allegations contained above in Paragraphs 1 through 46 as if fully rewritten.

48. The Indenture of Lease provided that the Lessee would have mining facilities under construction or would commence mining within two (2) years of November 1, 1968.

49. In September, 1970, Defendant, Ranger, informed Plaintiffs it would not have mining facilities under construction by November 1, 1970, and requested an extension of time to have facilities under construction or commence mining and promised, as inducement to the execucution by Plaintiffs of a proposed one (1) year extension, to construct a mine producing coal from the Sewell seam in the McGraw area by early 1972 and to construct a mine or mines producing in the Trough Fork area by late 1972, which latter mine or mines would produce at least one million two hundred fifty thousand (1,250,000) tons of coal per year.

50. In September, 1970, in consideration of and reliance on said promises in inducement, Plaintiffs executed a document styled "Indenture" dated September 22, 1970, granting the Lessee a one (1) year extension in which to have mining facilities under construction or to commence mining, which Indenture provided that Lessee would proceed with all haste and finalize plans as soon as possible.

51. The McGraw area contains approximately sixteen million (16,000,000) tons of Sewell seam coal, and the anticipated coal mine would have had an annual capacity of about four hundred thousand (400,000) tons of coal per year.

52. Defendants never commenced the mine at the McGraw area and have produced no coal from this area.

53. The Trough Fork area contains approximately twenty-six million (26,000,000) tons of coal in the Sewell seam and sixty million (60,000,000) tons of coal in the Beckley seam and eighteen million (18,000,000) tons of coal in the Little Raleigh seam.

54. No coal was mined from the Trough Fork area until December, 1973; no coal was mined from the Sewell seam in the Trough Fork area until November, 1977, and no coal has ever been mined from the Little Raleigh seam in the Trough Fork area.

55. A royalty was paid on a total of about two hundred eighteen thousand nine hundred seventy-seven (218,977) tons of coal mined from the Beckley seam in the Trough Fork area from the Beckley No. 1 Mine, through the year 1978, at which time the mine was abandoned.

56. Through May 31, 1980, a royalty was paid on a total of four hundred thirty-nine thousand one hundred sixty (439,160) tons of coal mined from the Sewell seam in the Trough Fork area from the Beckley No. 4 Mine.

57. If the mines in the McGraw area and Trough Fork area had been constructed and placed in production as promised in inducement to execution of the extension, they would have produced thirteen million two hundred thousand (13,200,000) tons of coal upon which a royalty of approximately nineteen million dollars ($19,000,000,-.00) would have been paid to Plaintiff, Y & O, to this date. The Defendants never commenced a mine in the McGraw area and the Defendants paid Plaintiffs a royalty on a total of only six hundred fifty eight thousand one hundred thirty seven (658,137) tons of coal from the Trough Fork area as of May 1980, which total tonnage is less than the tonnage promised per year for the Trough Fork area. Defendants have breached their promise to construct a mine in the McGraw area and have breached their covenant to produce one million two hundred fifty thousand (1,250,000) tons of coal annually from the Trough Fork area.

58. Defendants now project only six hundred thousand (600,000) tons per year from the Trough Fork site, which would yield Plaintiff, Y & O, the equivalent of eight million dollars ($8,000,000.00) during the remainder of the lease term, and no tonnage at all from the McGraw area, thereby repudiating their promise to construct and produce. If said mines had been constructed as promised and if the promised production had been achieved, the mines would produce sixteen million five hundred thousand (16,500,000) tons of coal during the remainder of the term of the Indenture of Lease yielding Plaintiff, Y & O, twenty-three million dollars ($23,000,000.00) in royalty payments.

WHEREFORE, Plaintiff, Y & O, prays for judgment against Defendants in the amount of nineteen million dollars ($19,000,000.00) for royalties based on tonnage not produced but promised to date and of twenty-three million dollars ($23,000,000.00) for royalties on tonnage which would have been produced during the remainder of the term of the Indenture of Lease had said promises been kept and not repudiated, together with interest and costs.

FOURTH COUNT

59. Plaintiffs incorporate the allegations contained above in Paragraphs 1 through 58 as if fully rewritten.

60. Defendants, in entering into the Indenture of Lease and in promising to pay as a royalty a percentage of the gross sales price of coal mined and produced from the premises, impliedly promised Plaintiffs to sell the said coal for the best price obtainable.

61. Defendants have not marketed the coal for the best price obtainable.

62. Defendants made book entries pertaining to coal mined from the premises in such a way as to show it to have been sold at lower prices than the selling price received by Defendants, their subsidiaries or affiliates for comparable coal on which no percentage royalty was paid to Plaintiff.

63. Defendants sold Plaintiffs' coal, or by said book entries showed it to have been sold, at lower prices than for which it could have been sold and for less than the best price obtainable.

64. The breaches of the express and implied covenants of the Indenture of Lease as herein set out have damaged Plaintiff, Bellemead, in the amount of one million five hundred thousand dollars ($1,500,000.00) and Plaintiff, Y & O, in the amount of eight million five hundred thousand dollars ($8,500,000.00).

WHEREFORE, Plaintiff, Bellemead, prays for judgment against Defendants in the amount of one million five hundred thousand dollars ($1,500,000.00) and Plaintiff, Y & O, prays for judgment against Defendants in the amount of eight million five hundred thousand dollars ($8,500,000.00), together with interest and costs.

FIFTH COUNT

65. Plaintiffs incorporate the allegations contained above in Paragraphs 1 through 64 as if fully rewritten.

66. Defendants promised to pay a royalty upon the gross sales price of Plaintiffs' coal F.O.B. the premises.

67. Defendants did not pay such a royalty and did not sell Plaintiffs' coal F.O.B. the premises but took it from the premises to other property owned by them or their subsidiaries and affiliates and sold said coal from said

sites and paid royalties upon fictitious and contrived selling prices set entirely by Defendants, their subsidiaries and affiliates.

68. Defendants have set off against said fictitious and contrived selling prices a percentage charge which has been stated to be a sales commission, although no such commission has been paid.

69. Plaintiff, Bellemead, has been damaged by said breaches in an amount unknown to it but which it believes and avers to be at least one million dollars ($1,000,000.00), and Plaintiff, Y & O, has been damaged by said breaches in an amount unknown to it but which it believes and avers to be at least six million dollars ($6,000,000.000).

WHEREFORE, Plaintiff, Bellemead, prays for judgment against the Defendants in the amount of one million dollars ($1,000,000.00) and Plaintiff, Y & O, prays for judgment against the Defendants in the amount of six million dollars ($6,000,000.00) or, in the alternative, Plaintiffs pray that Defendants be required to render a full accounting to Plaintiffs of the manner of disposition of the coal mined and removed from the premises and of payments received for said coal and of commissions paid, and Plaintiffs pray for judgment in the amounts stated herein, which are the amounts believed to be due Plaintiffs as a result of said accounting, together with interest and costs.

SIXTH COUNT

70. Plaintiffs incorporate the allegations contained above in Paragraphs 1 through 69 as if fully rewritten.

71. Defendants in promising to mine and remove the greatest practical quantity of coal during the term of the Indenture of Lease impliedly promised to market the coal

mined and removed from the premises in markets available to them.

72. Defendants did and do have markets available for the sale of Plaintiffs' coal but did not and are not selling Plaintiffs' coal in said markets but have marketed other comparable coal purchased by them or owned by them, their subsidiaries or affiliates in said markets and thereby have breached their implied promise to market coal mined and removed from the premises in markets available to them, to Plaintiffs' damage in an amount unknown to them but which they believe and aver to be in the approximate amounts of ten million dollars ($10,000,000.-00) to Plaintiff, Bellemead, and of forty million dollars ($40,000,000.00) to Plaintiff, Y & O.

WHEREFORE, Plaintiffs pray that Defendants be required to render a full accounting to Plaintiffs of the amount of comparable coal marketed by the Defendants or their subsidiaries or affiliates during the term of the Indenture of Lease and of the price paid for such coal, and Plaintiffs pray for judgment in the amounts of ten million dollars ($10,000,000.00) to Plaintiff, Bellemead, and forty million dollars ($40,000,000.00) to Plaintiff, Y & O, the amounts belived to be due Plaintiffs as a result of said accounting, together with interest and costs.

SEVENTH COUNT

73. Plaintiffs incorporate the allegations contained above in Paragraphs 1 through 72 as if fully rewritten.

74. In 1974, Defendants were paying to Plaintiffs royalties on alleged sales of coal made for about thirty-six dollars ($36.00) per ton for coal produced on the premises, while at the same time there was a market for coal of comparable quality at much higher prices.

75. On or about August 23, 1974, Plaintiff, Y & O, directed the attention of the Defendant, Pittston, to the higher market.

76. Pittston acknowledged the existence of said market and represented it did not sell coal in it, but Pittston promised to increase the production of Defendants' Beckley No. 1 Mine to twenty-five thousand (25,000) tons of coal per month beginning in March of 1975 and to eighty thousand (80,000) tons of coal per month by the middle of 1976.

77. Plaintiff, Y & O, believed and relied on the representation by Defendant, Pittston, that it did not sell coal in said higher market and on the promise by Defendant, Pittston, to increase production, and Plaintiff, Y & O, did not act to compel Defendants to sell at the best price obtainable.

78. Defendants did sell other comparable coal on the higher market at great prices and to their great profit and did not sell Plaintiffs' coal on the higher market and did not increase production at the Beckley No. 1 Mine to the level promised, but abandoned said Beckley No. 1 Mine.

79. If the Beckley No. 1 Mine had begun producing eighty thousand (80,000) tons per month by mid-1976, as promised, Plaintiff, Y & O, would have been paid royalties in the amount of about six million dollars ($6,000,000.00) to this date and in an amount having a present value of about fourteen million dollars ($14,000,000.00) during the remainder of the term of the Indenture of Lease.

WHEREFORE, Plaintiff, Y & O, prays for judgment against Defendants in the amount of twenty million dollars ($20,000,000.00), together with interest and costs.

EIGHTH COUNT

80. Plaintiffs incorporate the allegations contained above in Paragraphs 1 through 79, as if fully rewritten.

81. The Defendants did not make wheelage payments to the Plaintiff in accordance with the Indenture of Lease.

82. As a result of Defendants' failure to make such wheelage payments, the Plaintiffs were damaged in amounts unknown at this time but believed to be in the amounts of approximately forty thousand dollars ($40,000.00) to Plaintiff, Bellemead, and forty thousand dollars ($40,000.00) to Plaintiff, Y & O.

WHEREFORE, Plaintiff, Bellemead, prays for judgment against the Defendants in the amount of forty thousand dollars ($40,000.00) and Plaintiff, Y & O, prays for judgment against Defendants in the amount of forty thousand dollars (40,000.00) and Plaintiffs pray that Defendants be required to render a full accounting to Plaintiffs of the amount of coal transported across the premises by any means and to pay damages in accordance with said accounting, together with interest and costs.

NINTH COUNT

83. Plaintiffs incorporate the allegations contained in Paragraphs 1 through 82 as if fully rewritten.

84. Defendant, Ranger, covenanted in the Indenture and Indenture of Lease not to disclose geological information pertaining to the premises without Plaintiffs' consent.

85. Defendant, Ranger, did disclose such geological information to Defendant, Pittston, without Plaintiffs' consent.

86. Defendants did disclose such geological information to third persons unknown to Plaintiffs without Plaintiffs' consent.

87. Defendants covenanted with the Plaintiffs not to assign the Indenture of Lease without Plaintiffs' written consent.

88. Defendants did together conspire to accomplish the transfer of ownership of the stock of Defendant, Ranger, to Defendant, Pittston, without Plaintiffs' consent, thereby accomplishing an assignment of the Indenture of Lease without Plaintiffs' consent.

89. Defendant, Ranger, prior to said assignment of its stock was engaged in the business of selling coal mined by it.

90. Subsequent to said assignment, Defendant, Pittston, caused Defendant, Ranger, to cease the business of selling coal mined by it.

91. Defendant, Ranger, prior to said assignment and the acquisition of all of the stock of Defendant, Ranger, by Defendant, Pittston, had been and was mining and selling about three million (3,000,000) tons of coal per year.

92. The coal mined and sold by Defendant, Ranger, prior to said assignment and the acquisition of all of the stock of Defendant, Ranger, by Defendant, Pittston, was of the same kind and quality as coal mined and sold by Defendant, Pittston, and Defendant, Ranger, was a competitor of Defendant, Pittston.

93. After said assignment and the acquisition of all of the stock of Defendant, Ranger, by Defendant Pittston. Defendant, Ranger, ceased selling its coal as aforesaid and Defendant, Pittston, by its dominion and control

over Defendant, Ranger, and Defendants together, did conspire to and did cause the amounts of coal mined and marketed from properties of the Defendant, Ranger, which had been about three million (3,000,000) tons in 1969, to be reduced in the year 1971 to one million six hundred twenty-five thousand one hundred sixty two (1,625,162) tons, in the year 1972 to one million one hundred forty-seven thousand fifteen (1,147,015) tons, in the year 1973 to seven hundred forty-eight thousand eight hundred eighty-four (748,884) tons, in the year 1974 to six hundred fifty thousand eight hundred sixty-three (650,863) tons, in the year 1975 to seven hundred sixty-three thousand one hundred thirty-eight (763,138) tons, in the year 1976 to five hundred twenty-six thousand eight hundred sixty-two (526,862) tons, in the year 1977 to five hundred twenty-two thousand nine hundred thirty (522,930) tons, and in the year 1978 to three hundred thirty-eight thousand two hundred sixty-nine (338,269) tons and in amounts unknown to Plaintiffs in the year 1979 but which they believe and aver to have been far less than three million (3,000,000) tons per year.

94. Prior to said assignment and the acquisition of all of the stock of Defendant, Ranger, by Defendant, Pittston, Defendant, Ranger, had a long-standing and valuable business relationship with Eastern Associated Coal Corp. whereby it sold large quantities of coal in competition with Defendant, Pittston, but immediately after said assignment and the acquisition of all of the stock of Defendant, Ranger, by Defendant, Pittston, said business relationship was terminated.

95. Defendant, Ranger, acquired the interest in the premises by the Indenture of Lease and promised in said Indenture of Lease to mine and market coal from the

premises as alleged above, and was able and willing to do so and would have been required to do so to maintain its volume of business.

96. Defendants did and are continuing to conspire to limit the production of Defendant, Ranger, and to eliminate it as a competitor of Defendant, Pittston, and in furtherance of said conspiracy did disclose said confidential geological information, make said assignment without Plaintiffs' consent, fail to develop the premises as promised and fail to market Plaintiffs' coal for the best price obtainable and otherwise act and conspire to eliminate Defendant, Ranger, as a significant competitor and to limit competition and to create a monoply, and as an incident and part of all of which they did conspire to act in such a way as to damage the premises and the Plaintiffs as hereinbefore more specifically alleged, and said acts are and were a combination or conspiracy in restraint of trade or commerce in the State of West Virginia, for the purpose or with the effect of limiting the mining of coal and its sale and controlling or maintaining its market price, and said acts are and were a continuing violation of the West Virginia Anti-Trust Act and Plaintiffs are injured thereby.

WHEREFORE, Plaintiffs pray for judgment in an amount equal to threefold the damages sustained by them as alleged in the Second Count, in the Third Count, in the Fourth Count, in the Fifth Count, and in the Sixth Count together with reasonable attorney's fees, filing fees, interest and the costs of this action, all as provided in the West Virginia Anti-Trust Act.

WHEREFORE, Plaintiffs demand judgment in accordance with the prayer at the end of each Count herein, plus interest and costs, against the Defendants, Ranger

and Pittston, Plaintiffs further pray for rescission or partial rescission, restitution, an accounting and other further relief to which they may be entitled.

/s/ JOHN C. KINDER
JOHN C. KINDER, OF THE FIRM
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185 West Main Street
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Attorney for The Youghiogheny and Ohio Coal Company

/s/ ROBERT BAILEY
Professional Building
Box 129
Pineville, West Virginia 24874
Telephone: (304) 732-6100
Attorney for Bellemead Coal Company

JURY DEMAND

Plaintiffs demand a trial by jury.

/s/ JOHN C. KINDER
JOHN C. KINDER

/s/ ROBERT BAILEY
ROBERT BAILEY

INSTRUCTIONS TO THE CLERK FOR CERTIFIED MAIL SERVICE:

Please make certified mail service upon the Defendant, Ranger Fuel Corporation, at Lebanon, Virginia, 24266, and by serving George Pizoli, Vice-President, at Post Office Box 966, Beckley, West Virginia, 25801; please make certified mail service upon the Defendant, The

Pittston Company, at 1 Pickwick Plaza, Greenwich, Connecticut, 06830, and by serving N. T. Camicia, President, at 224 Round Hill Road, Greenwich, Connecticut, 06830.

/s/ JOHN C. KINDER
JOHN C. KINDER

APPENDIX N

Arbitration Clause Contained in Indenture of Lease

ARBITRATION [Lease p. 53] Any controversy between the respective parties of the first, second and third parts and the Lessee arising under this lease shall be submitted to and determined by arbitration in the manner hereinafter set forth. The question in dispute to be so determined shall be submitted to two arbitrators, one to be appointed by the pertinent parties of the first, second and third parts, as the case may be, and one by the Lessee, and the two so chosen shall appoint a third arbitrator who shall be fully qualified, but wholly disinterested; provided, however, that if they cannot agree upon the third arbitrator, they shall request the Judge of the United States District Court for the Southern District of West Virginia to appoint such third arbitrator, and the appointment so made by such Judge shall be final and binding upon all of the parties hereto. The party desiring arbitration [Lease p. 54] shall, upon nominating its arbitrator, notify the other party in writing of such nomination, and the other party shall, within twenty (20) days after receiving such notice, nominate its arbitrator. The two arbitrators so chosen shall choose the third arbitrator within ten (10) days. The arbitrators shall, after hearing the parties and receiving any evidence tha tthey may submit, make their decision and award and reduce the same to writing, and deliver one copy thereof to the pertinent parties of the first, second and third parts, as the case may be, and one copy to the Lessee. The decision and award of at least two of such arbitrators shall be final and conclusive and binding upon the parties hereto, and said arbitrators, or any two of them, may in their decision or award and as a part thereof decide by whom

and (if by both parties) in what proportions the costs of such arbitration shall be borne and paid and of the amount of such costs. The submission to arbitration as herein provided shall be a condition precedent to a resort to litigation by either party upon any matter in controversy arising under this lease. In the event that a decision or an award shall not be made within sixty (60) days after notification is given by the party desiring arbitration to the other party to nominate its arbitrator, the rendering of such decision or award shall not be a condition precedent to the institution of litigation by either party hereto.

APPENDIX O

STATUTORY PROVISIONS

9 U.S.C. §4 (1970):

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure,

or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

28 U.S.C. §1332(a)(1981):

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States:

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Fed. R. Civ. P. 19(a) & (b):

Rule 19. Joinder of Persons Needed for Just Adjudication. (a) *Persons to Be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair

or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder Not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 24:

Rule 24. Intervention. (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that

the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of of the rights of the original parties.

(c) *Procedure.* A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., §2403.

Office - Supreme Court, U.S.
FILED
JUL 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2317

In The

Supreme Court of the United States

October Term, 1981

RANGER FUEL CORPORATION,

Petitioner,

v.

THE YOUGHIOGHENY AND OHIO COAL COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

JOHN F. KAY, JR.
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TABLE OF CONTENTS

	Page
OPINION BELOW	1
STATUTE INVOLVED	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	5
I. The Fourth Circuit's Finding Of No Jurisdiction Is Entirely Consistent With Supreme Court Precedent And Does Not Create A Conflict Among The Circuits Or Within The Fourth Circuit	5
A. The Fourth Circuit's Holding Is Not Contrary To This Court's Controlling Decisions	6
B. The Fourth Circuit's Holding Creates No Conflict Among The Circuits	7
C. The Fourth Circuit's Holding Creates No Conflict Within The Fourth Circuit	8
D. The Fourth Circuit's Holding Entails No Issue Requiring Resolution By This Court	9
II. The Fourth Circuit's Decision That The Action Should Be Dismissed Because Of The Absence Of An Indispensable Party Is Not In Conflict With Applicable Supreme Court Decisions	10
CONCLUSION	13
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

Cases

Bry-Man's Inc. v. *Stute,* 312 F.2d 585 (5th Cir. 1963)	11
Calvert v. *Bradley,* 16 How. (57 U.S.) 580 (1853)	11

Page

Hamilton Life Insurance Co. v. *Republic National Life Insurance Co.*, 408 F.2d 606 (2d Cir. 1969) 7

Harrell & Sumner Contracting Co. v. *Peabody Petersen Co.*, 546 F.2d 1227 (5th Cir. 1977) 11

Hilti, Inc. v. *Oldach*, 392 F.2d 368 (1st Cir. 1968) 7

In re Mercury Construction Corp., 656 F.2d 933, *reh. den.* 664 F.2d 936 (4th Cir. 1981), *cert. granted sub nom. Moses H. Cone Memorial Hospital* v. *Mercury Contruction Corp.*, ... U.S. ....., 71 L. Ed. 2d 647 (1982) 8, 9

C. Itoh & Co. (American) v. *Jordan International Co.*, 552 F.2d 1228 (7th Cir. 1977) 7, 8

Kentucky Natural Gas Corp. v. *Duggins*, 165 F.2d 1011 (6th Cir. 1948) 11

Prima Paint Corp. v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) 6

Provident Tradesmens Bank & Trust Co. v. *Patterson*, 390 U.S. 102 (1968) 10, 11, 12

Scherk v. *Alberto-Culver Co.*, 417 U.S. 506 (1974) 6

Schutten v. *Shell Oil Co.*, 421 F.2d 869 (5th Cir. 1970) 11

Shields v. *Barrow*, 17 How. (58 U.S.) 130 (1855) 10, 11

Tewa Tesuque v. *Morton*, 498 F.2d 240 (10th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975) 11

Rules and Statutes

Fed. R. Civ. P. 19 ..... 10, 11, 12

Title 9 U.S.C. § 3 ..... 6, 7, 9

Title 9 U.S.C. § 4 ..... *passim*

Title 28 U.S.C. § 1332(a) 4

In The

Supreme Court of the United States

October Term, 1981

No.....

RANGER FUEL CORPORATION,

Petitioner,

v.

THE YOUGHIOGHENY AND OHIO COAL COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The unanimous opinion of the United States Court of Appeals for the Fourth Circuit is currently reported at 677 F.2d 378 (4th Cir. 1982) and is reproduced in the Appendix to the petition as Appendix A beginning at 1a.

STATUTE INVOLVED

9 U.S.C. § 4 (1970) provides in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States

district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . .

QUESTIONS PRESENTED

1. Whether, after a civil action for breach of a lease had been instituted in a state court by the Youghiogheny and Ohio Coal Company (Y&O) and Bellemead Coal Company (Bellemead) as co-lessors against Ranger Fuel Corporation (Ranger) as lessee, the district court had jurisdiction to compel Y&O to arbitrate that controversy under 9 U.S.C. § 4 when the court would not have had subject matter jurisdiction of the state court action.

2. Even if the district court had jurisdiction, whether it should have dismissed the action by Ranger against Y&O to compel arbitration because Bellemead, as co-lessor under the lease in dispute and co-plaintiff in the state court action, was an indispensable party to the action whose joinder would have destroyed diversity jurisdiction.[1]

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[1] The Questions Presented as set forth in Ranger's petition incorrectly assume that the arbitration provision of the lease requires arbitration of the controversy alleged in the state court action and incorrectly suggest that Y&O and Bellemead joined together as plaintiffs in the state court action in order to avoid federal court enforcement of that provision. Y&O has asserted throughout this litigation that, as a matter of law, the arbitration provision in the lease does not require arbitration of the matters in dispute in the state court action or, at the least, that it was entitled to a jury trial of that issue. Because the Fourth Circuit found that district court lacked subject matter jurisdiction, this issue, of course, was not resolved. Moreover, as the Fourth Circuit recognized, Y&O and Bellemead, as co-lessors under the lease, were indispensable parties to an action under the lease. Thus, they necessarily and properly joined as co-plaintiffs in the state court action.

STATEMENT OF THE CASE

On April 17, 1970, Y&O, an Ohio corporation, and Bellemead, a West Virginia corporation, leased certain coal seams located within approximately 31,000 acres of land in West Virginia to Ranger, a West Virginia corporation. Y&O and Bellemead jointly own undivided interests in coal underlying approximately 7,000 acres of this land; Y&O alone owns coal underlying approximately 24,000 acres of this land. Under the terms of the lease, Ranger agreed to mine the area and to pay royalties on the coal produced. Moreover, subsequent to the lease, Ranger made additional promises concerning mine construction and coal production.

Disputes arose between the lessors Y&O and Bellemead and the lessee Ranger (and its parent corporation the Pittston Company [Pittston])[2] under the lease and under contracts separate from the lease. On August 4, 1980, Y&O and Bellemead together, though represented by separate counsel, filed suit against Ranger and Pittston in Harrison County, Ohio, alleging in nine counts various breaches by Ranger of covenants in the lease, breaches of the separate contracts, and an antitrust conspiracy.[3]

On October 31, 1980, nearly three months after suit was filed, Ranger moved to dismiss the Ohio action based, in part, on an arbitration clause contained in the lease. One week later, Ranger instituted an action against only Y&O in the United States District Court for the Southern District of West Virginia, asking the court to stay the Ohio action and to compel Y&O (but not Bellemead) to arbitrate the claims it had filed against Ranger in the Ohio action. Ranger relied on the Federal Arbitration Act, specifically 9 U.S.C.

[2] For the sake of simplicity, respondent will generally refer only to Ranger as the lessee and defendant in these disputes.

[3] The Court of Appeals accurately described this controversy as "complex". See Appendix A to petition at 5a.

§ 4, as the basis for its petition and asserted diversity of citizenship under 28 U.S.C. § 1332(a) as the jurisdictional basis for the action. Y&O is an Ohio corporation; Ranger and Bellemead are both West Virginia corporations. Contemporaneously with the filing of its action against Y&O in the district court, Ranger filed a separate action against Bellemead in a West Virginia state court seeking an order compelling Bellemead to arbitrate the claims it had filed against Ranger in the Ohio action.

In the district court, Y&O raised several jurisdictional, procedural, and substantive defenses to Ranger's petition, including inadequate notice, lack of jurisdiction, absence of an indispensable party (Bellemead), and the denial of the making of, or default under, an agreement to arbitrate. Y&O demanded a jury trial on the issues relating to the making of and default under an arbitration agreement as specifically provided by 9 U.S.C. § 4. Without providing Y&O the jury trial to which it was entitled, the district court entered an order on December 19, 1980, in which it held that it had diversity jurisdiction and ordered that Y&O must litigate eight of the nine counts in the Ohio action as a condition precedent to litigation. Also, the court enjoined Y&O from proceeding further with all nine counts in the Ohio action.[4] The district court held that Bellemead was not an indispensable party, but stayed its order for two weeks to afford Bellemead an opportunity to intervene. Bellemead did not exercise that option.

On January 9, 1981, Y&O appealed to the United States Court of Appeals for the Fourth Circuit, raising numerous grounds for reversal, including lack of subject matter jurisdiction, absence of an indispensable party (Bellemead), no

[4] The court did not order the arbitration of the ninth (antitrust) count, yet it enjoined Y&O from proceeding with it.

agreement by Y&O to arbitrate the claims raised in the Ohio action, denial of Y&O's right to a jury trial, denial of Y&O's right to due process, and the unwarranted injunction of the state court proceeding. On March 25, 1982, the Fourth Circuit reversed the district court on the ground that it lacked diversity jurisdiction and, in the alternative, that Bellemead was an indispensable party to the action whose joinder would destroy diversity.[5] The Fourth Circuit remanded the case with instructions to dismiss Ranger's action.

REASONS FOR DENYING THE WRIT

I. The Fourth Circuit's Finding Of No Jurisdiction Is Entirely Consistent With Supreme Court Precedent And Does Not Create A Conflict Among The Circuits Or Within The Fourth Circuit.

The Fourth Circuit held that the district court could not compel arbitration pursuant to 9 U.S.C. § 4 for lack of subject matter jurisdiction. Under Section 4 of the Federal Arbitration Act, a district court has jurisdiction only if it "save for the [arbitration] agreement, would have jurisdiction under Title 28, in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4. The district court properly identified "the controversy between the parties" as counts one through eight of the Ohio action.[6] Based upon that finding, the Fourth Circuit ruled that, because counts one through eight of the Ohio action include allegations that Ranger breached its obligations to both Y&O and Bellemead, the district court would

[5] Because the Fourth Circuit based its decision on the most fundamental errors assigned by Y&O—lack of jurisdiction and absence of an indispensable party—it did not reach a decision on the other errors assigned.

[6] The Court of Appeals held this finding not to be clearly erroneous. Moreover, Ranger itself had identified the Ohio action as the controversy to be arbitrated in its petition.

not have had jurisdiction of the subject matter of the Ohio action because of a lack of diversity between Ranger and Bellemead.

A. *The Fourth Circuit's Holding Is Not Contrary To This Court's Controlling Decisions.*

Ranger argues that the Fourth Circuit's jurisdictional ruling is contrary to this Court's controlling decisions. Ranger Pet. at 6. Yet Ranger does not clearly identify the "controlling decisions" to which it refers and thus necessarily does not explain why the decision of the Fourth Circuit is contrary to them. The only decisions of the Supreme Court even cited by Ranger in this context were *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974). Ranger Pet. at 8, 12. While those two cases evidence this Court's recognition of the policies favoring arbitration, they have no relevance to the jurisdictional question at issue here. In fact, neither case even arose under or involved 9 U.S.C. § 4—the statute under which Ranger attempted to proceed.

In *Prima Paint, supra,* in the context of a request for a stay of a federal action pending arbitration under 9 U.S.C. § 3, this Court noted the "clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." 388 U.S. at 404. Similarly in *Scherk, supra,* in the context of a motion for a stay of a federal action pending arbitration, this Court acknowledged the noteworthy purpose underlying the Federal Arbitration Act of allowing parties to avoid the costliness and delays of litigation. 417 U.S. at 510-11. Notwithstanding this general encouragement of the enforcement of arbitration agreements in pending federal litigation, this Court has never sanctioned the federal

court enforcement of agreements to arbitrate controversies over which the federal court would not have jurisdiction.

B. *The Fourth Circuit's Holding Creates No Conflict Among The Circuits.*

Ranger also contends that the Fourth Circuit's jurisdictional holding creates a conflict among the circuits. Ranger Pet. at 6. Again, Ranger neglects to identify the conflict, the circuits in conflict, or the cases demonstrating the conflict. Ranger appears to argue that the Fourth Circuit's holding is contrary to those in *C. Itoh & Co. (America)* v. *Jordan International Co.*, 552 F.2d 1228 (7th Cir. 1977), *Hamilton Life Insurance Co.* v. *Republic National Life Insurance Co.*, 408 F.2d 606 (2d Cir. 1969), and *Hilti, Inc.* v. *Oldach*, 392 F.2d 368 (1st Cir. 1968). Ranger Pet. at 7. Ranger's reliance on the foregoing cases in order to demonstrate a conflict among the circuits reveals the extent of Ranger's confusion over the statutory language of the Federal Arbitration Act.

Not one of these cases cited by Ranger involves a question of jurisdiction under 9 U.S.C. § 4. *C. Itoh* and *Hilti, supra,* involved litigation already pending in the federal court in which one party applied for a stay of that litigation under 9 U.S.C. § 3 pending arbitration. Because § 3 of the Federal Arbitration Act applies only to litigation already before the federal court, § 3 cases by definition do not involve the jurisdictional question at issue here. *Hamilton Life, supra,* while a § 4 case, raised no question of the district court's jurisdiction, but only one concerning the validity of the arbitration agreement. 408 F.2d at 609.

The foregoing cases' factual distinctions from the instant case are perhaps as significant as their legal distinctions. Each case involved a third party to a contractual dispute who was *not a signatory* to the arbitration agreement at

issue. The courts of appeals properly found that the parties to the arbitration agreement should proceed with arbitration despite the existence of the third party.[7] Unlike the situation in those cases, the third party to the instant contractual dispute—Bellemead—is a signatory to the arbitration agreement and its interests are coexistent with those of Y&O, the party Ranger singled out for the federal court action. Because all of the parties to the underlying controversy and to the arbitration agreement at issue were not before the district court and could not be brought before that court, the Fourth Circuit properly held that the court lacked jurisdiction to compel arbitration.

C. *The Fourth Circuit's Holding Creates No Conflict Within The Fourth Circuit.*

Finally, Ranger suggests that the Fourth Circuit's jurisdictional holding creates a conflict within the Fourth Circuit in light of its earlier decision in *In re Mercury Construction Corp.*, 656 F.2d 933, *reh. den.*, 664 F.2d 936 (4th Cir. 1981), *cert. granted sub nom. Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, ... U.S. ....., 71 L. Ed. 2d 647 (1982). Ranger Pet at 9. *Mercury* involved separate disputes between a building owner and its contractor, who were parties to an arbitration agreement, and between the owner and its architect, who was not party to any arbitration agreement. In order to avoid arbitration of its dispute with the contractor, the owner filed a "contrived" and "reactive" action in state court against both its contractor and its architect, 656 F.2d at 938, 944, seeking, *inter alia*, a declaratory judgment that its dispute with the contractor was non-arbitrable. The Fourth Circuit held that the

[7] The court in *C. Itoh* did not order arbitration due to a finding of no agreement to arbitrate.

owner could not avoid federal enforcement of its arbitration agreement with the contractor under 9 U.S.C. § 4 simply by filing a preemptive state court action and by joining its claims against the architect in that action. As with the other circuit court cases cited by Ranger, the existence of an independent basis for the federal court's jurisdiction was not at issue. In short, no inconsistency exists between *Mercury* and the instant case, thus explaining why the two circuit judges common to the *Mercury en banc* court and the panel of the Fourth Circuit below, Chief Judge Winter and Circuit Judge Butzner, joined in the opinion of the court in both cases.[8]

D. *The Fourth Circuit's Holding Entails No Issue Requiring Resolution By This Court.*

The question that Ranger urges this Court to answer here has already been answered by Congress in the express language of the Federal Arbitration Act. Federal courts will enforce arbitration agreements in disputes being litigated in federal court by staying such litigation pursuant to 9 U.S.C. § 3 pending arbitration. In disputes not being litigated in federal court, however, the federal courts can only enforce an arbitration agreement if it would have, "save for such agreement, jurisdiction . . . of the subject matter of a suit arising out of the controversy between the parties". 9 U.S.C. § 4. The controversy between the parties, as well as the suit that arose out of such controversy—the Ohio action—involve Y&O, Bellemead, and Ranger. As the Fourth Circuit recognized, the district court would have lacked jurisdiction over such suit, and thus had no jurisdiction to order arbitration or to enjoin the pending state court action.

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[8] The third member of the panel below, Circuit Judge Haynsworth, who joined in the opinion of Circuit Judge Butzner, did not sit with the *en banc* court that heard argument in *Mercury*.

II. The Fourth Circuit's Decision That The Action Should Be Dismissed Because Of The Absence Of An Indispensable Party Is Not In Conflict With Applicable Supreme Court Decisions.

After finding that the district court lacked the requisite subject matter jurisdiction under 9 U.S.C. § 4, the Fourth Circuit held that the action should otherwise have been dismissed because Bellemead was an indispensable party whose joinder would have destroyed diversity jurisdiction. The court reasoned that whether the proper focus is upon the underlying controversy being litigated in the Ohio action or simply upon the petition in federal court to compel arbitration and stay the litigation of that controversy, Bellemead was indispensable to the action. Bellemead, as co-lessor with Y&O of jointly owned coal interests and as co-plaintiff with Y&O in the Ohio action, was found to be a party who should have been joined in the federal action if feasible under Rule 19(a), Fed. R. Civ. P. A pragmatic consideration of the factors prescribed by Rule 19(b), Fed. R. Civ. P., led the Fourth Circuit to hold that the federal action brought by Ranger in Bellemead's absence should have been dismissed.

Ranger contends that the Fourth Circuit's holding is in conflict with applicable Supreme Court decisions and suggests that the Supreme Court's "outdated and irrelevant" decision in *Shields* v. *Barrow*, 17 How. (58 U.S.) 130 (1855) is not an "applicable decision." Ranger Pet. at 13-14. Ranger again neglects to specify which "applicable decisions" of the Supreme Court are in conflict with the Fourth Circuit's decision below. And while Ranger boldly asserts that *Shields* v. *Barrow* is "outdated and irrelevant," its only support for this assertion is language contained in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 123-25 (1968) advising against using *Shields* as a substitute for Rule 19 analysis. The Fourth Circuit did not use *Shields* as a sub-

stitute for Rule 19 analysis, but, rather, found support in *Shields* for its application of the Rule 19 factors. Moreover, this Court recognized in *Provident Tradesmens, supra,* that the principles stated in *Shields* "are still valid today, and they are consistent with the requirements of Rule 19." 390 U.S. at 124.

A review of the relevant Supreme Court precedent amply demonstrates that, contrary to Ranger's assertion, the Fourth Circuit's holding is entirely consistent with applicable Supreme Court decisions. The Supreme Court in *Calvert* v. *Bradley,* 16 How. (57 U.S.) 580 (1853), recognized early on that all lessors must join in an action based on breach of covenants running to all lessors. The logic and conclusion of this Court's opinion in *Calvert* have been consistently followed even after the codification of the indispensable party principles in Rule 19. *See Harrell & Sumner Contracting Co.* v. *Peabody Petersen Co.,* 546 F.2d 1227, 1229 (5th Cir. 1977); *Bry-Man's Inc.* v. *Stute,* 312 F.2d 585 (5th Cir. 1963). The Ohio action brought by Y&O and Bellemead involves breaches of covenants running to both Y&O and Bellemead, the co-lessors under the lease. The Ohio action also involves Y&O's and Bellemead's joint claim for rescission of the lease. As this Court held in *Shields* v. *Barrow, supra,* all parties to a contract are indispensable in an action for rescission. *Accord, Tewa Tesuque* v. *Morton,* 498 F.2d 240 (10th Cir. 1974), *cert. denied,* 420 U.S. 962 (1975); *Schutten* v. *Shell Oil Co.,* 421 F.2d 869 (5th Cir. 1970); *Kentucky Natural Gas Corp.* v. *Duggins,* 165 F.2d 1011 (6th Cir. 1948). Such "applicable decisions" of the Supreme Court confirm the validity of the Fourth Circuit's holding that Bellemead is indispensable to an action to compel arbitration of the controversies underlying the Ohio action and to enjoin that action.

Ranger asks this Court to exercise its supervisory power

to review the Fourth Circuit's application of the factors specified in Rule 19(b), Fed. R. Civ. P. While this Court has offered some guidance to lower courts concerning the proper application of those factors, *see Provident Tradesmens, supra,* no case has been found in which this Court has reviewed a court of appeals' consideration of those factors. Indeed, this Court indicated in *Provident Tradesmens, supra,* that the indispensable party determination must be based on factors varying with each case. 390 U.S. at 118-19. Ranger has failed to demonstrate any compelling reason for this Court to undertake such a review in *this* case, or to show what precedential value such a review could have.

A review of the Fourth Circuit's consideration of the Rule 19(b) factors demonstrates that review of this decision is unnecessary. The prejudice to Bellemead caused by a judgment in its absence and the inadequacy of the relief granted in its absence were pragmatically analyzed by the Fourth Circuit, as required by *Provident Tradesmens, supra.* The factor found most compelling by the Fourth Circuit was the fact that Ranger will have an adequate remedy if the federal action is dismissed. Ranger has raised the arbitration clause as a ground for dismissal in the Ohio action, which has all the parties to the controversy before the court.[9] Ranger will not be denied resolution of its rights, if any, to arbitration, but only a federal forum for such resolution.[10] Con-

[9] While Ranger complains throughout its petition that the Fourth Circuit's decision will require multiplicity of litigation (Ranger Pet. at 12-13, 16), it is *Ranger's* position that has already resulted in its claims to arbitration being raised in three separate suits.

[10] Curiously, Ranger claims that the Fourth Circuit should have ordered arbitration of the counts of the Ohio action not involving Bellemead. Such relief, however, is impossible to fashion on this record. Moreover, Ranger's claim totally ignores the fact that it sought arbitration of and an injunction of the entire Ohio action, thus identifying the controversy to be arbitrated and the parties to it.

trary to Ranger's argument, the Federal Arbitration Act does not alter this analysis, inasmuch as § 4 provides Ranger no guarantee of a federal forum for the enforcement of its alleged rights to arbitration of this controversy. In summary, the Fourth Circuit was understandably unable to discern any prejudice to Ranger from a dismissal of its action which could outweigh the prejudice to Bellemead from allowing the action to proceed. Ranger has failed to cite a single case or relevant fact that could lead this Court to find otherwise.

CONCLUSION

For the foregoing reasons, Y&O respectfully requests this Court to deny a writ of certiorari to review the judgment of the Fourth Circuit.

Respectfully submitted,

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July 22, 1982

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 1982, three copies of the Respondent's Brief in Opposition were mailed, first-class, postage prepaid, to W. Warren Upton, Esquire, Jackson, Kelly, Holt & O'Farrell, 1500 One Valley Square, P. O. Box 553, Charleston, West Virginia 25322, Counsel for Petitioner and that all parties required to be served have been served.

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